130-267

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~481~~ 205

THE MANHATTAN BANK OF MEMPHIS, TENNESSEE, APPELLANT,

vs.

ELIZA WALKER.

FILED NOVEMBER 17, 1885.

No. ~~1029~~. 682

ELIZA WALKER, APPELLANT,

vs.

THE MANHATTAN BANK OF MEMPHIS, TENNESSEE.

FILED AUGUST 31, 1887.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 481.

THE MANHATTAN BANK OF MEMPHIS, TENNESSEE, APPELLANT,

vs

ELIZA WALKER.

FILED NOVEMBER 17, 1885.

No. 1029.

ELIZA WALKER, APPELLANT,

vs.

THE MANHATTAN BANK OF MEMPHIS, TENNESSEE.

FILED AUGUST 31, 1887.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1219.

THE MANHATTAN BANK OF MEMPHIS, TENNESSEE, APPELLANT,

vs.

ELIZA WALKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

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Edward Goldsmith for five thousand dollars and secured by stock of the capital stock of defendant and attached to said note to the amount of six thousand dollars, and four promissory notes for three hundred and twenty-five dollars in the aggregate.

That said defendant evidenced the receipt on special deposit of said bonds, securities, and choses in action by its obligation in writing, whereby it acknowledged the receipt thereof on special deposit from complainant, and acknowledged that it received said bonds, securities, and choses in action as bailed for complainant; and said defendant, according to the tenor and effect of said written
5 obligation, was bound and required to deliver the said bonds, securities, and choses in action, or any part thereof, to complainant on demand.

That the bonds hereinbefore mentioned had coupons attached thereto for the interest, payable thereon at certain stated periods.

That of the bonds, securities, and choses in action deposited with defendant as aforesaid the items of eleven hundred dollars, People's Insurance Company stock, and three hundred and twenty-five dollars, notes, were returned to complainant; that the remainder of said bonds, securities, and choses in action hereinbefore mentioned, to wit, the 3,000 of bonds of the Memphis & Charleston Railroad Company and twenty-two hundred dollars, bonds of the Mis-
6 sissippi Central Railroad Company, with the coupons attached to all said stock, and the note of Goldsmith, for $5,000, with bank stock as aforesaid attached thereto, were never returned to complainant.

That complainant made demand a number of times for said bonds, coupons, note, and stock of defendant, and the defendant has [in] each and every instance when such demand was made refused and still refuses without any cause therefor to deliver the same to complainant; that such refusal of defendant to comply with the said demands of complainant is in violation of the terms of the agreement contained in the aforementioned written obligation; that complainant is advised she is entitled to the delivery to her by defendant of said bonds, coupons, note, and bank stock.

7 That the failure of said defendant to deliver said bonds, coupons, note, and bank stock is, as she is advised, a conversion thereof and entitles her at her election to recover the highest value thereof at any time since she made demand therefor and up to the date when she may obtain a decree herein.

That complainant, if she recovers said bonds, coupons, note, and bank stock, is entitled, as she is advised, to recover the amount of any decline in the value thereof between the time of her first demand therefor and the date when the same shall be restored to her; that the bonds, coupons, note, and bank stock wrongfully withheld from her, as aforesaid, by defendant are of the value of fifteen thousand dollars.

8 Premises considered, complainant prays that said Manhattan Bank of Memphis may be made the party defendant herein; that subpœna and all other proper and necessary process may issue that said defendant be required to answer the allegations

of this bill; that complainant may have a decree for the return to her of the bonds, coupons, promissory note, and bank stock hereinbefore mentioned, and for the amount of the decline in the value of the same since she made demand therefor up to the date when said bonds, coupon-, notes, and stock shall be restored. And if said bonds, coupons, note, and stock cannot be had, that she may have a personal decree against defendant for the highest value thereof
9 at any time since she first made demand for the same up to the date of such decree, with interest thereon; and that complainant may have such other and further relief, general & special, as she may be entitled to receive in the premises; and as in duty bound complainant will every pray, &c.

L. & E. LEHMAN AND
METCALF & WALKER,
Sols for Compl't.

Cost Bonds.

We, Eliza Walker & L. Lehman, acknowledge ourselves indebted to the Manhattan Bank of Memphis in the sum of two hundred and fifty dollars, to be paid if the said Eliza Walker, complainant in a bill which has this day been filed in the chancery court of Shelby county against the said Manhattan Bank, shall pay all such
10 costs as may be awarded against her by the court in its decrees and orders in said cause.

This 19 day of January, 1883.

ELIZA WALKER,
By L. LEHMAN, *Attorney.*
L. LEHMAN.

Subpœna to Answer. Issued Jan'y 20, 1883. *R. J. Black, C. & M.*

The State of Tennessee to the sheriff of Shelby county:

Summon The Manhattan Bank of Memphis, if to be found in your county, to appear before the chancery court of Shelby county, at the court-house in Memphis, Tenn., on the first Monday in March next, then and there to answer the bill of complaint of Eliza Walker, a copy of which accompanies this writ. Herein fail not, and have you then and there this writ.

Witness Robert J. Black, clerk & master of said court, at
11 office, in Memphis, this first Monday in October, 1882.

R. J. BLACK, *C. and M.*,
By J. M. BRADLEY, *D. C. & M.*

Return.

Came to hand 20 day of Jan'y, 1883, and executed same day on M. Maas, the cashier of the Manhattan Bank, and left with him a copy of the bill.

P. R. ATHY, *Sh'ff*,
By C. R. STEWART, *D. S.*

Ans. Manhattan Bank. Filed Feb'y 16, 1883. *R. J. Black, C. & M.*

In the Chancery Court of Shelby County, Tenn.

ELIZA WALKER
vs.
THE MANHATTAN BANK OF MEMPHIS. } 4774.

12 Saving and reserving all exceptions to the manifold errors contained in said bill, respondent, for answer to so much thereof as it is advised it is material for it to answer, says it admits that it is a corporation engaged in the banking business at Memphis, Tenn. Respondent denies that on the 27 Nov., 1880, it rec'd *an* special deposit any bonds, securities, and choses in action belonging to compl't, and it cannot admit that it ever at any time rec'd, on either special or general deposit, any bonds, securities, and choses in action belonging to compl't. The facts connected with these transactions, so far [as] they are within respondent's knowledge, are as follows: For some time prior to Nov., 1880, Mr. G. H. Judah, a brother-in-law of compl't, kept an account and had transactions with respondent in which he styled himself sometimes agent
13 and sometimes guardian, but without disclosing who he was agent or guardian for. He made deposits and drew checks in that way on his said acc't just as the other deposit*ions* with respondent did, and in the regular and ordinary *cause* of business, and at different times prior to Nov., 1880, he bought the Memphis and Charleston railroad bonds, the Mississippi Central Railroad Co.'s bonds, & the stock in the People's Insurance Co., mentioned in the bill, & paid for them by checking on his said acc't with respondent. As he would buy these securities he would leave them and deposit with respondent without asking for or taking any receipt for them. In the fall of 1880 he left with respondent the Goldsmith note and collaterals and the other four notes mentioned in
14 the bill. These notes respondent recollects were payable to said G. H. Judah, as agent, simply without saying who he was agent for. The notes, however, will show how this is. *Less* to the 27 Nov., 1880, or about that date, the said Judah had never told respondent whether he had any principal or not in these matters, or who his principal was or who he was guardian for, if for any one. On or about that date, however, he asked respondent to give him a receipt, as agent for Mrs. Eliza Walker, the compl't, for said bonds, stocks, & notes, telling it at the time that he was the complainant's general agent for the management & control of said securities & notes. Respondent gave him a receipt as such agent, and it supposes that is the receipt referred to in the bill. Respondent kept no copy of it, and as compl't now claims to have
15 it respondent asks that it may be produced & filed herein to speak for itself. After said receipt was executed by respondent some of the notes described in it were paid while they were on deposit with the respondent, and the said Judah, as agent of compl't, drew out the money in the regular & ordinary way, just as other customers of the bank; and from time to time, & on different oc-

sions, in the usual course of business, he, as agent of complainant, withdrew from respondent's custody the bonds & stock and other notes and choses in action mentioned in said receipt until he had withdrawn them all, when he gave respondent a receipt for them, in which he acknowledged their reception as agent of complainant.

Respondent will produce and file this receipt, or a copy,
16 whenever he is required to do so. Whether the compl't actually owned these securities respondent cannot tell, but it has cause to believe that they were not her property, and, in so far as it is necessary to protect its rights, respondent demands strict proof of her title and ownership of said funds, notes, and securities.

Further answering, respondent says: That if compl't owned or had any interest in said securities & choses in action then the said Judah had authority from her to control and manage them just as fully as she could have done as owner if they had been in her actual possession instead of in his possession as her agent. He was her general agent with reference to these bonds, securities, & choses, and had power not only to deposit them, but also to withdraw
17 them from deposit if he saw fit, and when he demanded said securities from respondent his agency was still in force unrevoked, and respondent could not legally have refused to give them up to him as compl't's agent. And respondent is advised, & so charges, that upon returning said securities & choses in action to said Judah as agent as aforesaid all its liability with reference thereto ceased not only as to compl't, but as to all the world.

As to the allegations in the bill that by the terms of its receipt respondent was required to deliver said securities & choses to compl't on demand, respondent says that said receipt will speak for itself when produced, but no matter how this is it is advised that the delivery to complainant's agent, Judah, was in law a de-
18 livery to compl't.

As to the demand made by compl't respondent has this to say: As stated above, the first request and demand*ed* for said securities were made by compl't thro' her agent, Judah. With these demands respondent complied and supposed the matter ended. Nothing more was heard of it until a few days before the bill was filed in this cause, when another agent of compl't, or at least one who represented himself as her agent, made another demand on respondent for said securities and choses in action. Respondent replied that they had already been delivered to complainant thro' her agent, Judah, and it could not make a second delivery. Respondent does not believe that this last demand would ever have been made but for the fact that the house of Walker, Sons & Co., of which
19 house complainant's son was a member, became embarrassed and failed a short time before the demand was made and the bill filed. The said compl't, thro' her agent, Judah, had loaned said securities, choses in action, or their proceeds, as def'd't is informed, to said firm, or had let it have the benefit of them in some way, and it was not until she was threatened with loss of said securities or their proceeds, by reason of the embarrassed condition of her son's firm, that she thought of coming back on respondent for

the value thereof. Respondent denies that said securities are now or ever were worth fifteen thousand dollars. Respondent cannot tell what their true value is, but if it becomes material it can be shown by proof. And in conclusion the respondent denies that
20 it is indebted to compl't on acc't of said securities or on any other account or in any sum whatever. And having fully answered, respondent prays to be hence dismissed with its costs in this behalf expended.

HARRIS & TURLEY,
Sol's for Resp's't.

Petition for Removal. Filed July 5, 1883. R. J. Black, C. & M.

In the Chancery Court of Shelby County, Tennessee.

ELIZA WALKER
vs.
THE MANHATTAN BANK OF MEMPHIS. } 4774.

To the Hon. W. W. McDowell, chancellor of the above-named chancery court:

The petition of Eliza Walker, the complainant in the above-named suit, respectfully shows unto your honor that she is a
21 citizen of the State of Pennsylvania, and that the defendant, The Manhattan Bank of Memphis, is a body politic and corporate, created under the laws of the State of Tennessee, having its situs at the city of Memphis, in the county of Shelby and State of Tennessee, and as such corporation so created is, within the meaning of the law, a citizen of the State of Tennessee.

That the above-named cause is a civil suit, and the matters in dispute therein exceed, exclusive of costs, the sum and value of five hundred dollars.

That there is a controversy in said suit between citizens of different States.

That no trial has been had in said suit, and the present term of the above-named chancery court is the first term thereof at which said suit could be first tried.

That petitioner, said Eliza Walker, desires to remove said
22 suit into the circuit court of the United States for the western district of Tennessee, in the western division thereof, at the aforementioned city of Memphis, the district wherein the above-named chancery court is held and where said suit is pending, and that petitioner makes and files herewith a bond, with good and sufficient security, for her entering in such circuit court, on the first day of its next session, a copy of the record in said suit, and for paying all costs that may be awarded by said circuit court, if such court shall hold that said suit was wrongfully or improperly removed thereto.

Premises considered, petitioner prays that this petition and peti-

tioner's said bond may be accepted, and that said suit be re-
23 moved to said circuit court of the United States as is by law
in such case made and provided; and, is in duty bound, petitioner will ever pray.

ELIZA WALKER.
L. LEAHMAN, *Her Att'y.*
L. & E. LEHMAN,
METCALF & WALKER,
By Sol's for Comp'ts.

Bond of Removal. Filed July 5, 1883. *R. J. Black.*

We, Eliza Walker and L. Leahman, acknowledge ourselves indebted to the Manhattan Bank of Memphis in the sum of two hundred and fifty dollars, to be void if the said Eliza Walker shall, on the first day of the next succeeding term of the circuit court of the United States for the western district of Tennessee, in the western division thereof, at Memphis, — a copy of the record in the suit now
pending in the chancery court of Shelby county, Tennessee,
24 wherein she is complainant & said bank is defendant, and
shall pay all costs that may be awarded by said circuit court if the same shall hold that said suit was wrongfully or improperly removed for trial thereto, and shall pay all such costs as may be awarded against — by the court in its decrees and orders in said cause; otherwise to remain in full force and vestue.

This 5 day of July, 1883.

ELIZA WALKER,
By L. LEHMAN, *Her Att'y.*
L. LEHMAN.

Order for Removal. E. July 5, 1'83. *M.* 39, *P.* 416.

ELIZA WALKER
vs.
THE MANHATTAN BANK OF MEMPHIS. } 4774.

25 In this cause came on this day to be heard the petition of the complainant for the removal of the same into the circuit court of the United States for the district of West Tennessee, in the western division thereof, and the complainant having made and filed her bond with good and sufficient security, conditioned as is prescribed by the act of Congress in that behalf, and the matters in dispute herein exceed the sum and value of five hundred dollars, and the controversy herein is wholly between citizens of different States, the court does accept said petition and bond, and it is ordered
that this court proceed no further in this suit, and that the
26 same be removed into the aforementioned circuit court of the
United States to be held at Memphis, in the county of Shelby and State of Tennessee, on the fourth Monday of November next.

STATE OF TENNESSEE, } *ss:*
Shelby County, }

I, Robert J. Black, clerk and master of the chancery court of Shelby county, do hereby certify that the foregoing 27 pages comprise a full, true, and perfect transcript of — had in a certain cause lately pending herein, wherein Eliza Walker [was] complainant and the Manhattan Bank defendant, as the same appears of record and on file in my office.

In witness whereof I hereunto set my hand and affix the seal of said court, at office in Memphis, this 20 day of Sept., A. D. 1883.

[SEAL.] R. J. BLACK,
Clerk and Master.

27 *Replication of Compl'nt to Answer of Defendant.*

In the Circuit Court of the United States for the Western District of Tennessee. In Equity.

ELIZA WALKER *vs.* THE MANHATTAN BANK OF MEMPHIS.

This repliant, saving and reserving to herself all and all manner of advantage of exception to the manifold insufficiencies of the answer of the defendant herein, for replication thereto saith: That she will aver and prove her original bill herein to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be answered unto by this repliant.

Without this that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be
28 replied unto, confessed and avoided, traversed or devised, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by her said bill she hath already prayed.

METCALF & WALKER,
L. & E. LEHMAN,
Sol's for Compl'nt.

[Endorsed:] No. 384. Circuit court of the United States, western district of Tennessee. U. S. circuit court. In equity. Eliza Walker *vs.* Manhattan Bank. Replication. Filed Jan'y 15, 1884. Bell W. Etheridge, cl'k. W. B. Weisiger, D. C. Metcalf & Walker, L. & E. Lehman, sol's, etc.

29 UNITED STATES OF AMERICA,
— *Division of the Western District of Tennessee:*

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1883, at the United States

court-house, in the city of Memphis, in said district, on, to wit, the 11 day of March, A. D. 1884, in the following cause, to wit:

ELIZA WALKER, Plaintiff,
vs.
MANHATTAN BANK, Defendant. } No. 384.

In this cause, upon the application of the complainant, W. R. Probasco, a United States commissioner of Cincinnati, Ohio, is hereby appointed a special commissioner to take and certify under seal of his office the deposition of Adam A. Krauser, a witness for the complainant, upon the direct interrogatories herein filed.

30 UNITED STATES OF AMERICA, *District of West Tennessee:*

To H. R. Probasco, U. S. commissioner:

Trusting in your fidelity and capacity to examine witnesses you are hereby authorized and empowered to cause Adam A. Krauser to come before you, on the — day of —— next, at Cincinnati, Ohio, and him diligently to examine on the interrogatories attached touching his knowledge of the matters in controversy in a cause now pending in the circuit court of the United States for said district, wherein Eliza Walker [is] plaintiff, and the Manhattan Bank of Memphis is defendant, said examination, reduced to writing and signed by said witness, to be read as evidence on behalf of complainant on the trial of said cause; and the same, duly certified under your hand and seal, to return, with this writ, to this office without delay.

Witness Bell W. Etheridge, clerk, and the seal of said court, at office in Memphis, this 11th day of March, A. D. 1884.

BELL W. ETHERIDGE, *Clerk.*
W. B. WEISIGER, *D. C.*

31 In the Circuit Court of the United States for the Western District of Tennessee, at Memphis. In Equity.

ELIZA WALKER *vs.* THE MANHATTAN BANK OF MEMPHIS.

Interrogatories to be propounded to ADAM A. KRAUSER, Esq., to be used in taking his deposition as a witness on behalf of the complainant in the above-named cause.

Interrogatory 1. Please state your name, age, place of residence, and occupation.

Interrogatory 2. Are you acquainted with the parties in this suit?

Interrogatory 3. Please state whether you are acquainted with Mr. M. Maas; and, if so, whether you ever met him at the city of Memphis, in the State of Tennessee, and what position, as an officer or otherwise, he then held with the defendant in this suit, the Manhattan Bank of Memphis.

32 Interrogatory 4th. If you say you met with said M. Maas at said city of Memphis, please give the date as near as you can remember the same, and state what demand you made on him for three thousand dollars of bonds of the Memphis and Charleston

Railroad Company, and twenty-two hundred dollars of bonds of the Mississippi Central Railroad Company, with coupons attached, and one note for five thousand dollars made by Edward Goldsmith, with stock of the capital of the defendant attached thereto as security; and in whose behalf you made such demand; and in what capacity as an officer of the defendant such demand was made on said M. Maas; and what response was made by him to such demands; and whether or not he refused or offered to comply therewith.

33 Interrogatory 5th. In the original bill in this cause is mention- a certificate of deposit alleged to have been issued by the defendant for the aforementioned bonds and note and stock and other securities to the complainant. If you have said certificate, please state, if you know, who signed the same on behalf of the defendant and annex a copy thereof to your deposition as a part thereof, marked "Exhibit A," and state whether you will forward the original to be produced in evidence at the hearing of this cause.

METCALF & WAKER,
L. & E. LEHMAN,
Sol's for Complainant.

Endorsed: No. 384. Circuit court of the United States, western district of Tennessee. In equity. Eliza Walker *v.* Manhattan Bank. Interrogatories to take depositions. Filed January 15th, 1884. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

34 THE UNITED STATES OF AMERICA, }
Southern District of Ohio, } *ss:*

Deposition of Adam A. Krauser, taken before me, ——, a United States commissioner within and for the southern district of Ohio, in answer to interrogatories hereto attached, and in — of commissions hereto attached.

I certify that the deposition of Adam A. Krauser was taken and written by me, and subscribed by him in my presence; that I am not [a] party, nor am I of counsel in this suit. Said Krauser was first solemnly sworn.

H. R. PROBASCO,
U. S. Commissioner, No. Dist. of Ohio.

35 Answer to interrogatory 1. My name is Adam A. Krauser; age, thirty-seven; residence, 357 West Fourth street, Cincinnati, Ohio; occupation, lawyer; member of the Cincinnati bar.

Answer to interrogatory 2. I am acquainted with the parties in this suit.

Answer to interrogatory 3. I am acquainted with Mr. M. Maas, and met him at the city of Memphis, State of Tennessee. At that time he was acting as an officer of the Manhatan Bank of that city—either as cashier or assistant cashier.

Answer to interrogatory 4. As near as I now recall the date I met Mr. M. Maas in the place of business of the Manhatan Bank of Memphis, between Christmas, 1882, and the first week in January,

1883. I believe it was before New Year's day of 1883. I called at the office in the bank at Memphis, and personally
36 demanded of him as the officer of the Manhattan Bank three thousand dollars of bonds of the Memphis and Charleston Railroad Company, and twenty-two hundred dollars of bonds of the Mississippi Central Railroad Company with coupons attached, and one note for five thousand dollars made by Edward Goldsmith, with six thousand dollars of the capital stock of the Manhattan Bank at Memphis attached thereto as security. I made this demand as attorney for and in behalf of Mrs. Eliza Walker, of Philadelphia. Mr. Maas was there acting apparently as the cashier of the Manhattan Bank. Upon making this demand Mr. Maas hesitated for some time, and finally stated that he could not return them, and that he regretted very much that he could not do so. I asked him why not. But again after some hesitation he replied that these bonds and stocks had been disposed of. I then asked him how they were
37 disposed of and by whom, and stated further that I could not see how they could have been disposed of by him or his bank, being the property of Mrs. Eliza Walker, and that I then held for her in my hands the original certificate of special deposit, which I stated to Mr. Maas had been made out by himself and sent by him by mail to Mrs. Walker to Philadelphia, and that she had never parted with it, as she had advised me, but had authorized me to deliver it to him or to the bank upon the return of the bonds and stock named. I thereupon showed him the original certificate of deposit. He read it over and admitted that he had written it and sent it to Mrs. Walker to Philadelphia, but he said he had forgotten that he had issued the certificate of deposit, and in the meantime he had given them to Mr. L. H. Judah, and they were not any more in the possession of the bank and he
38 could not return them to Mrs. Walker. I asked him then by what authority he did deliver them to Mr. Judah, and he replied that they were deposited in the bank by him, and as he had forgotten that he had issued the certificate of deposit he returned them to Mr. Judah, but had he known that he had issued the certificate he would not have done so. I told him then the bank would be held responsible by Mrs. Walker. Thereupon he told me to wait a few moments in the rear office of the bank, which I did, and he would consult about it. He left me there and went back in the front part of the bank behind the counter and returned in a few moments later and stated again that he regretted he could not return the bonds and stock. I asked him then to pay Mrs. Walker the value of them or have — returned in kind; but he refused to do so, stating that he would consult further with some officer of
39 the bank and would see me again in the evening at my hotel, the name of which I gave him. He did call at my hotel in the evening, where I met him, and I then had a further conversation with him on the subject. I told him then the matter must be settled up or I would be obliged to institute suit against the bank. He stated finally that he would not comply with the demand that I made, and refused to do so. I said, Mr. Maas, you know very well

that property belonged to Mrs. Walker and you had no right to dispose of it. He said, "That — all right," but went on to say something about Mr. Judah's firm owing the bank money, but he hesitated and did not finish the sentence and refused to say anything more about it.

Answer to interrogatory fifth: I have the original certificate of deposit issued by the Manhattan Bank at Memphis to the
40 complainant. It is signed Maurice Maas, "A. C.," on a page with the officers and style of the Manhattan Bank of Memphis printed at the head. It is signed by Mr. Maas as assistant cashier on the behalf of the defendant apparently. I annex a correct copy thereat to my deposition as a part thereat, and made the same Exhibit "A," and I will forward the original to be produced in the evidence at the hearing of the case whenever desired.

ADAM A. KRAUSER.

Commissioner's fees—$2.75—paid by Mr. Krauser for complainant.

41 G. H. Judah, Esq., agent for Mrs. Eliza Walker, of Philadelphia, has placed with us on special deposit—

$3,000 Memph. & Charl. R. R. 2nd m't'g bonds;
$2,200 Miss. Central " " "
$1,100 People's Insurance Co. stock;
$5,000 note E. G. and collateral attached—$6,000 M. Bank stock;
$325 interest notes (4 @ 81.25.)

(Signed) MAURICE MAAS,
A. Cas.

(Copy.)

"Exhibit A."

H. R. PROBASCO,
U. S. Commissioner.

[Endorsed:] No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *v.* Manhattan Bank. Depo. of Kauser. Filed Apr. 29, 1884. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

42 U. S. Circuit Court, Western District of Tennessee.

ELIZA WALKER
vs.
MANHATTAN BANK. } No. 384. Equity.

Cross-interrogatories to be propounded to the witness, ADAM A. KRAMER.

1. How many visits did you make to Memphis in the latter part of 1882?

2. Was not your first visit made in Dec., 1882, & was it not to get Mrs. Walker's claim against Walker, Sons & Co. paid or adjusted?

3. On that visit did you not see Lee B. Walker, & did he not promise to remit Mrs. Walker part of the debt?

4. Did you not also, during that first visit, see Judah at
43 his boarding-house or home, where he was confined by sickness?

5. Was not a check given you by Walker, Sons & Co., or Lee B. Walker, or Judah, or some one on behalf of Walker, Sons & Co., during this first visit, to be applied as a payment on Mrs. Walker's claim against Walker Sons & Co., & did you not hold up said check at the request of said Lee B. Walker?

6. Was not your second visit made on account of the fact that Walker Sons & Co. failed to send money to Mrs. Walker?

7. What was the date of your second visit to Memphis?

8. How long did you remain in Memphis?

9. What hotel did you stop at?

10. On the occasion of this second visit did you not receive
44 from Walker Sons & Co. a large amount of notes, secured by mortgages, as security for Mrs. Walker's claim against them?

11. What was the amount of Mrs. Walker's claim against them?

12. Was it not for monies belonging to Mrs. Walker which Walker, Sons & Co. had used in their business?

13. On the occasion of your second visit to Memphis did you not go to Indian Bay, Arkansas, & see about the collection of the notes to mortgages that you had received from Walker, Sons & Co. for Mrs. Eliza Walker?

14. Who compose the firm of Walker Sons & Co.?

HARRIS & TURLEY,
For Bank.

45 Interrogatories to be propounded to the witness ADAM A. KRAMER on re-examination after he shall have replied to the foregoing X interrogatories.

Re-int. 1. If in response to any of the foregoing X interrogatories you speak of making a visit to Memphis to have any claim in favor of Mrs. Walker against Walker, Sons & Co. adjusted, then state the character & amount of such claim, how it arose, & whether it embraced the whole or any part of the bonds & note or the proceeds thereof mentioned in the certificate of deposit to which you have already testified in this cause?

Re-int. 2. Did you ever assert any claim against Walker, Sons & Co. for said bonds & note or any part thereof, or was your claim therefor made against the defendant & the defendant alone?

46 Re-int. 3. If you say Lee B. Walker promised to remit part of a debt owning by Walker, Sons & Co. to Mrs. Walker, then state whether such debt was in any way based on the bonds & note or any part thereof involved in this suit.

Re-int. 4. If you say you received a check from Lu B. Walker or Walker Sons & Co. to be applied as a payment on Mrs. Walker's claim against the firm, then state whether such claim was in any wise based on said bonds & notes or any part thereof.

that property belonged to Mrs. Walker and you had no right to dispose of it. He said, "That — all right," but went on to say something about Mr. Judah's firm owing the bank money, but he hesitated and did not finish the sentence and refused to say anything more about it.

Answer to interrogatory fifth: I have the original certificate of deposit issued by the Manhattan Bank at Memphis to the
40 complainant. It is signed Maurice Maas, "A. C.," on a page with the officers and style of the Manhattan Bank of Memphis printed at the head. It is signed by Mr. Maas as assistant cashier on the behalf of the defendant apparently. I annex a correct copy thereat to my deposition as a part thereof, and made the same Exhibit "A," and I will forward the original to be produced in the evidence at the hearing of the case whenever desired.

ADAM A. KRAUSER.

Commissioner's fees—$2.75—paid by Mr. Krauser for complainant.

41 G. H. Judah, Esq., agent for Mrs. Eliza Walker, of Philadelphia, has placed with us on special deposit—

$3,000 Memph. & Charl. R. R. 2nd m't'g bonds;
$2,200 Miss. Central " " "
$1,100 People's Insurance Co. stock;
$5,000 note E. G. and collateral attached—$6,000 M. Bank stock;
$325 interest notes (4 @ $1.25.)

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4. Did you not also, during that first visit, see Judah at
43 his boarding-house or home, where he was confined by sickness?

5. Was not a check given you by Walker, Sons & Co., or Lee B. Walker, or Judah, or some one on behalf of Walker, Sons & Co., during this first visit, to be applied as a payment on Mrs. Walker's claim against Walker Sons & Co., & did you not hold up said check at the request of said Lee B. Walker?

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For Bank.

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Re-int. 1. If in response to any of the foregoing X interrogatories you speak of making a visit to Memphis to have any claim in favor of Mrs. Walker against Walker, Sons & Co. adjusted, then state the character & amount of such claim, how it arose, & whether it embraced the whole or any part of the bonds & note or the proceeds thereof mentioned in the certificate of deposit to which you have already testified in this cause?

Re-int. 2. Did you ever assert any claim against Walker, Sons & Co. for said bonds & note or any part thereof, or was your claim therefor made against the defendant & the defendant alone?

46 Re-int. 3. If you say Lee B. Walker promised to remit part of a debt owning by Walker, Sons & Co. to Mrs. Walker, then state whether such debt was in any way based on the bonds & note or any part thereof involved in this suit.

Re-int. 4. If you say you received a check from Lu B. Walker or Walker Sons & Co. to be applied as a payment on Mrs. Walker's claim against the firm, then state whether such claim was in any wise based on said bonds & notes or any part thereof.

Re-int. 5. If you say you received from Walker, Sons & Co. notes, as recited in X interrogatory 10. then please state if the same were received for a claim different from or identical with the subject-matter of this suit.

Recross examined:

47 Is it not a fact that you have no personal knowledge of how Mrs. Eliza Walker's claim against Walker Sons & Co. arose?

L. & E. LEHMAN,
METCALF & WAKER,
For Compl't.

48 Deposition of Adam A. Kramer taken before me, David J. Workum, a notary public within & for Hamilton county, Ohio, pursuant to and by virtue of the cross-interrogatories *re-interrogatories* hereto annexed, to be read in evidence on behalf of the parties to the cause now pending in the United States circuit court, western district of Tennessee, in which Eliza Walker is plaintiff, and the Manhattan Bank is defendant. Cause number 384, equity.

ADAM A. KRAMER, of lawful age, being by me first duly cautioned & sworn, deposes & says, as follows:

Cross-interrogatories:

In answer to the first X interrogatory the witness testifies as follows:

49 Answer 1st. I made two visits to Memphis about the time indicated. The first visit was in December; 1882, the other, I think, was early in 1883.

In answer to the second X interrogatory the witness testifies as follows:

Answer 2d. The first visit was, as already stated, in December, 1882; it was made by me for Mrs. Walker to obtain from the Manhattan Bank the securities, bonds, and so forth covered by the certificate of deposit given by the bank. I took a written power of attorney from her with the certificate of deposit to Memphis for the purpose. I also endeavored to obtain from Walker Sons & Co. payment of part of Mrs. Walker's claim against them while there.

In answer to the 3d X interrogatory witness testifies as follows:

50 Answer 3d. I did see Lee B. Walker there, and he gave me a check for Mrs. Walker for one thousand dollars on account of the claim against Walker Sons & Co., and he did promise to remit to her more when she needed it.

In answer to the 4th X interrogatory the witness testifies as follows

Ans. 4th. I did see Judah during the time and at the place referred to.

In answer to the 5th X interrogatory the witness testifies as follows:

Ans. 5th. The check was given by Lee B. Walker, drawn by Walker Sons & Co., which was the check for one thousand dollars, already stated. I handed the check to Mrs. Walker on my return to Cincinnati. I did not hold up said check at the request of said Lee B. Walker.

51 In answer to the 6th X interrogatory the witness testifies as follows:

Ans. 6. The second visit was made, only partly, on account of the fact referred to.

In answer to the 7th X interrogatory the witness testifies as follows:

Ans. 7. As near as I can now recollect, it was in January, 1883, or thereabout.

In answer to the 8th X interrogatory the witness testifies as follows:

Ans. 8. About three or four days.

In answer to the 9th X interrogatory the witness testifies as follows:

Ans. 9. I think it was the Peabody hotel; I do not recollect stopping at any other hotel in Memphis.

In answer to the 10th X interrogatory the witness testifies as follows:

52 Ans. 10. I did receive from them a number of notes said to be secured by mortgage to be applied to the claim of Mrs. Walker against Walker, Sons & Co.

In answer to the 11th X interrogatory the witness testifies as follows:

Ans. 11. I do not recollect the exact amount. My impression is it was on two notes—one for about ten thousand dollars and one for about nine thousand, though I am not certain as to the exact amount.

In answer to the 12th X interrogatory the witness testifies as follows:

Ans. 12. It was for monies Mrs. Walker had loaned to Walker, Sons & Co.

In answer to the 13th X interrogaory the witness testifies as follows:

Ans. 13. I did go to Indian Bay, Arkansas, for that purpose.

53 In answer to the 14th X interrogatory the witness testifies as follows:

Ans. 14. The firm was composed apparently of Lee B. Walker & Ernest L. Walker. I am not positive of my own knowledge whether Judah was a member of the firm or not.

In answer to re-interrogatory 1st the witness testifies as follows:

Ans. 1. I have given the character and amount of Mrs. Walker's claim already, as near as I can. It arose from loans of money made by Mrs. Walker direct to the firm of Walker, Sons & Co., and a part of it was loaned to assist her son, Ernest L. Walker, in the firm, for which I was advised the firm was also responsible. None of these

claims, however, embraced the whole or any part of the bonds,
54 note, or proceeds of the same mentioned in the certificate of deposit, respecting which I have already testified in the case.

In answer to re-interrogatory 2d the witness testifies as follows:

Ans. 2. I never did assert any claim against Walker, Sons & Co. for any of the bonds or note, or part thereof, mentioned in said certificate of deposit. My claim, therefore, was made against the Manhattan Bank alone.

In answer to re-interrogatory 3d the witness testifies as follows:

Ans. 3d. The debt upon which Lee B. Walker promised to remit was strictly the claim of Mrs. Walker for money loaned the firm of Walker, Sons & Co.; and his promise and my negotiations
55 with him were solely based on that, and had no reference to the bonds, note, or securities, or any part of the same, mentioned in the certificate of deposit.

In answer to re-interrogatory 4th the witness testifies as follows:

Ans. 4. The claim upon which Lee B. Walker gave me a check for one thousand dollars was in no wise based upon said bonds, note, or any part thereof. I had no reference to them or either of them; I mean those mentioned in the certificate of deposit.

In answer to re-interrogatory 5 the witness testifies as follows:

Ans. 5. The notes referred to in my answer to cross-interrogatory 10 were given to me and and received by me for the claim of
56 Mrs. Walker for the monies loaned direct to Walker, Sons & Co. referred to, entirely independent of the bonds, notes, and securities mentioned in the certificate of deposit.

In answer to the question on recross-examination the witness testified as follows:

Answer. I have personal knowledge only so far from having seen the note or notes given her by Walker, Sons & Co., and the statements made by Ernest and Lee Walker and herself of her having loaned the monies.

ADAM A. KRAMER.

57 STATE OF OHIO, } *Hamilton County*, } ss:

I David J. Workum, a notary public within and for the county of Hamilton and State of Ohio, do hereby certify that Adam A. Kramer was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition by him subscribed as above set forth was reduced to writing by myself in the presence of said witness, and was subscribed by the said witness in my presence; that the answers as above set forth are in response to the cross-interrogatories, re-interrogatories, and recross-interrogatories hereto attached; that the reason *to* taking this deposition is that the said witness, Adam A. Kramer, lives more than one hundred miles from the place of trial of the above-mentioned cause; that I am
58 not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal this the 14th day of February, A. D. 1885.

[SEAL.] DAVID J. WORKUM,
Notary Public Hamilton County, Ohio.

$4.00 notary fees due.

D. J. W.

59 Circuit Court of the United States, Western District of Tennessee.

ELIZA WALKER *vs.* THE MANHATTAN BANK OF MEMPHIS.

Deposition of G. H. JUDAH, taken by consent, to be used in trial on behalf of defendant. Exceptions waived as to all matters except for incompetency and irrelevancy.

1 Q. Do you know the parties to this suit?

Ans. I do.

2 Q. Are you the G. H. Judah who deposited the Goldsmith note & the second-mortgage bonds of the Mem. & Ch. R. R'd Co. & of the Miss. Cent. R. R. Co., described in the pleadings & in the receipt, &c., to A. Krann's deposition, with def't?

Ans. I am.

3d. Q. What became of the five thousand dollars of E. Gold-
60 smith referred to above?

Ans. It was paid.

4th Q. When & to whom & by whom?

Ans. It was paid on or before maturity to me as agent of compl't, & by Mr. Goldsmith; the facts connected with its payment are as follows: Before the maturity of the note I tried to get Mr. Goldsmith to renew it for 12 mos., but he declined to do so, & insisted on paying it & accordingly it was paid by him.

5 Q. What did you do with the proceeds of this note after you collected it?

Ans. I loaned it to the firm of Walker, Sons & Co.

6 Q. What became of the second-mortgage bonds of the Mem. & Ch. R. R'd Co. & the Miss. Cent. R. R. Co., referred to above?

Ans. They were withdrawn from the Manhattan Bank by me as agent of compl't, & I hypothecated them at the Bank of Commerce for the benefit of Walker, Sons & Co.

61 7 Q. What authority did you have to collect said note & withdraw said bonds?

Ans. I had a fund for Mrs. Eliza Walker, the compl't, which I was managing as her general agent. Part of it I put in these bonds without consulting her. Her instructions to me were to use & manage the fund according to my best judgment, & to do with it for her just — I would do with my own. In some way I loaned the money to Goldsmith without consulting her, & in the same way I bought the People's Ins. Co. stock, and when the Goldsmith note fell due, & he declined to renew it, I loaned out the money again. My control as agent over the fund was unlimited from the first. It was as complete as over my own property, & I had the

same right to withdraw the bonds & collect the note that I
62 did to buy them in the first instance or to loan the money to Goldsmith in the first place.

8 Q. I see in receipt Ex. "A" to Krann's deposition an item of $325, interest notes. What notes were these & what became of them?

Ans. They were the 4 interest notes on Goldsmith's 5,000.00 note for 81.25 each, & matured, respectively, Feb. 1, May 1, Aug. 1, & Nov. 1, 1881; they were collected as they matured by me as agent of compl't, & proceeds remitted to her by me or by Walker Sons & Co.

9 Q. While the bonds & Peop[le's] Ins. Co. stock were in the custody of the Manhattan Bank, who collected the interest on the bonds & the dividends on the stock w'h matured after 27 Nov., 1880, & what became of said interest & dividend?

Ans. I collected both & remitted the proceeds to Mrs. Walker, the compl't.

10 Q. In answer to the 7th question above you speak of the
63 fund you were managing for compl't. Where did you keep this fund before you bought the bonds & Peop. Ins. Co. stock & loaned the money to Goldsmith?

Ans. I kept it on general deposit in the Manhattan Bank in my name, either as agent or guardian.

11 Q. How did you pay for said bonds & stock, & make the loan to Goldsmith?

Ans. By checks on said fund in the Manhattan Bank.

12 Q. Who composed the firm of Walker, Sons & Co.?

Ans. E. L. & L. B. Walker.

13 Q. What kin are they to compl't?

Ans. E. L. Walker is her son & L. B. Walker is her nephew.

14 Q. What connection are you to compl't?

Ans. My wife was her husband's sister.

15 Q. Did you ever see compl't after Nov. 27, 1880. If so, when?

Ans. I did some time afterwards; I saw her in Philadelphia;
64 I think it was in the summer of 1881.

16 Q. Did anything occur then with reference to the Goldsmith notes or the bonds & stock mentioned in Ex. A to Krann's deposition?

Ans. I remember telling her that it was doubtful whether the Goldsmith note would be renewed, & she told me, just as she had at first, if it was not to do the best I could in my judgment with the money collected on it.

17 Q. When you saw her, as stated above, in Philadelphia in the summer of 1881, did she give you any instruction that your agency was altered & changed in any way?

Ans. Not in the least.

18 Q. Look at the letters here shown you, all dated Phila., Pa.—the first Jan'y 18, '81; next, Feb'y 7, '81; next, Ap'l 22, '81, & next, Nov. 13, '82, & the dispatch Nov. 1, '82, & tell who they are from and make them Ex. to your dep'n.

65 Ans. They are from Mrs. Eliza Walker, & were written by her daughter Belle Walker, who did her corresponding, & are

her genuine letters. The dispatch is from Belle Walker, & is on behalf of Mrs. Eliza Walker. I make the dispatch & letters Ex. Nos. 1 to 5 to my dep'n.

19 Q. In a former part of your deposition you speak of having remitted the int. on the Goldsmith note, & on the bonds, after Nov. 27, '80, either yourself or thro' Walker, Sons & Co. Explain how this was.

A. I was the manager of Walker, Sons & Co., & superintended their business, and compl't understood this. When money was to be remitted to her I would generally send it thro' the house, and the letters w'd be written in Walker, Sons & Co.'s name. Sometimes I might write in my own name.

X-examined by sol'rs for compl't:

X Int. 1. Were all the items mentioned in the certificate
66 of deposit of November 27th, 1880, whereof a copy is attached to Adam Kramer's deposition, placed in the bank, said items being as follows: $3,000, Memphis & Charleston 2nd mortgage bonds; $2,200, Miss. Central m'tg. bonds; $1,100 People's Insurance Co. stock; $5,000, note E. G., & collateral attached; $6,000, M. Bank; $325, interest notes, (4 @ 81.25)?

Ans. Yes, sir.

X Int. 2. The item E. G. means a note of Edward Goldsmith, and the collateral attached, marked "M. Bank," means stock of defendant; is this correct?

Ans. Yes, sir.

X Int. 3. Was Edward Goldsmith, the maker of that note, on November 27th, 1880, the defendant's cashier?

Ans. I believe he was.

X Int. 4. Was said Goldsmith then absent in New York, & Maurice Maas, who was defendant's assistant cashier at Memphis, discharging the duties & functions of cashier of the Manhattan Bank at Memphis?

67 Ans. I think Goldsmith was then in Memphis, but am not positive. I think Maas was then keeping the books.

X Int. 5. Was Goldsmith at any time absent in New York & Maas acting as cashier of bank?

Ans. Yes, sir.

X Int. 6. Was Maas thus acting for several years?

Ans. I believe he was.

X Int. 7. Who handed you the $5,000.00 note, to enable you to collect it from Goldsmith?

Ans. I don't think I ever got the note, but Mr. Goldsmith either sent the money or got the Manhattan Bank to pay it, & the bank paid it to me. It may be that I endorsed the note when it was paid.

68 X Int. 8. Was Mr. Maurice Maas the officer of the bank who paid this money to you?

Ans. He was acting cashier at the time, & I presume he paid the money.

X Int. 9. Who handed you the second-mortgage bonds of the Mem. & Ch. R. R. Co. & the Miss. Cent. R. R. Co. bonds?

Ans. Mr. Maas.

X Int. 10. Was the interest on the bonds in question evidenced by coupons attached thereto?

Ans. Yes, sir.

X Int. 11. After these bonds were deposited in the bank did you go there & get the coupons to collect the interest?

Ans. I collected the coupons through the Manhattan Bank while the bonds were there. The bank sent the coupons to New York, where they were payable.

69 G. H. JUDAH.

Subscribed & sworn to before me this 11th day of June, 1884.

HUNSDON CARY,
U. S. Com'r Dist. West Tenn.

(Endorsed:) Deposition of G. H. Judah. Filed June 14, '84. Bell W. Ethridge, cl'k; W. B. Weisiger, D. C.

70 The deposition of G. H. Judah was closed with an agreement of counsel that the witness might be recalled and further cross-examined by the plaintiff's solicitors, and now, on this 30th day of July, 1884, the said witness is recalled and further cross-examined as follows, viz:

Turley, for def't.

Q. 1. You say, in answer to the 5th direct interrogatory, that you loaned the proceeds of the $5,000.00—Goldsmith note—to Walker, Sons & Co. How long was it after Goldsmith paid the note before you loaned the proceeds to Walker, Sons & Co.?

Ans. I don't suppose there was any time elapsed between the two transactions—that is, between the payment of the note and loaning of the proceeds by me to Walker, Sons & Co.

Q. 2. Is it not true that that money did not actually pass through your hands at all, but was placed directly to the credit of Walker, Sons & Co. on the books of the Manhattan Bank?

Ans. I suppose that is correct.

Q. 3. Do you not know that it is correct?

71 Ans. I wouldn't say positively, but that is my idea about it.

Q. 4. Was that money—the $5,000.00 proceeds of the Goldsmith note—ever placed on the books of the Manhattan Bank to the credit of the account you once had there for the plaintiff as agent or guardian?

Ans. Not that I know of.

Q. 5. Please state fully the entire transaction of the payment of the Goldsmith note, and the loan of the proceeds to Walker, Sons & Co. State how the thing was done.

Ans. A short time before the maturity of the note I was informed that Mr. Goldsmith declined to renew it, and that he had instructed the Manhattan Bank to pay it; and my understanding is that it was paid by placing the $5,000.00 to the credit of Walker, Sons & Co. with the bank, and that it went to pay off the indebtedness of

the firm of Walker, Sons & Co.; I know that I never got any benefit from it and that Walker, Sons & Co. did.

72 Q. 6. What indebtedness of Walker, Sons & Co. did that money go to pay?

Ans. I know some of it was used to pay indebtedness due to the Manhattan Bank; whether all of it was so used or not I cannot say.

Q. 7. Is it not true that either by bills payable or open account Walker, Sons & Co., at the time of the payment of the $5,000.00 note, was largely indebted to the Manhattan Bank, and that the whole amount of the proceeds of the Goldsmith note was applied, as far as it would go, to the payment of that indebtedness? Give your best recollection on that question, and say whether Walker, Sons & Co. were not at that time indebted to the Manhattan Bank in an amount largely more than $5,000.00.

Ans. Yes; Walker, Sons & Co. were then indebted to the bank considerably more than $5,000.00. I don't recollect whether

73 it all went to the bank or not.

Q. 8. When that $5.000 note was paid was it put under your absolute control so that you were at perfect liberty to use it as your judgment might dictate for the best interest of Mrs. Walker?

Ans. I suppose it was, as far as I recollect.

Q. 9. Was not that note paid before maturity?

Ans. It was; shortly before maturity.

Q. 10. Was not the bank, through its cashier & other officers at that time, pressing you in every conceivable form to make good the account of Walker, Sons & Co. with the bank, and did not the suggestion come from the cashier of the bank that the $5,000.00, proceeds of the Goldsmith note, be used that way?

Ans. The bank was trying to have the account reduced, but I can't say that they were pressing us any more than was nec-

74 essary. I don't recollect that the bank officers ever suggested to me to use the proceeds of the Goldsmith note to reduce that account.

Q. 11. Was it your own suggestion, or did you without suggestion from the bank use the proceeds of the Goldsmith note in whole or in part to reduce the indebtedness of the firm to the bank?

Ans. I really don't remember how that was.

Q. 12. Who was the cashier of the bank?

Ans. I think Maas was acting cashier.

Q. 13. Was not the Goldsmith note paid before maturity, and the proceeds used as already stated by you, upon an understanding between you & Maas, existing prior to the payment, that the whole transaction should be given the course that was actually given to it? I mean to ask whether the note was first paid and you

75 afterwards voluntarily applied the proceeds in whole or in part to reduce the indebtedness of the bank, or was the whole transaction arranged and understood between you & Maas before the payment?

Ans. I never had any understanding with Mr. Maas with regard to that.

Q. 14. Did you have any understanding with any other officer of the bank with regard thereto?

Ans. Not that I recollect.

Q. 15. Is [it] not a fact that this entire transaction of the payment of the Goldsmith note & the application of the whole or part of the proceeds to pay the indebtedness due the bank was done by Maas, and that you simply approved it after it was all done?

Ans. I don't know that it is a fact, sir.

Q. 16. What is your best recollection about it?

Ans. I think I loaned that money to Walker, Sons & Co.,
76 like I would have loaned it to Goldsmith, with the best intentions.

Q. 17. Did you, in advance of the payment of the Goldsmith note, instruct Maas to put the proceeds to the credit of Walker, Sons & Co.?

Ans. I don't know that I did.

Q. 18. Did you take any other note or evidence of the indebtedness of Walker, Sons & Co. to the plaintiff thus created?

Ans. No, sir; I don't think I did.

Q. 19. Did you take any sort of security from Walker, Sons & Co. to secure that indebtedness to the plaintiff?

Ans. No, sir.

Q. 20. Did you, upon your own judgment, think that an indebtedness by open account and without security of Walker, Sons & Co. was as good *as good* as Goldsmith's note secured by $6,000 of the stock of Manhattan Bank?

Ans. While it was not as good a collateral, *but* Walker, Sons &
Co. being closely related to the plaintiff, and needing money,
77 I thought it was perfectly safe to let them have it.

Q. 21. If you had had no connection or business relations with either the bank or Walker, Sons & Co., and had had the control as trustee of $5,000 in money, would you, under all the circumstances as they were then known to you, have loaned that $5,000.00 to Walker, Sons & Co. without security?

Ans. I don't suppose I would.

Adjourned to half past nine o'clock to-morrow morning.

Deposition resumed at 9.45 a. m., July 31st, 1884.

Q. 22. State the exact nature of your connection with the firm of Walker, Sons & Co.?

Ans. I was their general agent and had power of attorney for the general management of their business.

Q. 23. Did you have the actual general management of
78 their business from its inception down to the failure of the firm?

Ans. I did while I was at home.

Q. 23. When did the firm organize, and to what date did it continue in business?

Ans. My recollection is that the firm was organized about Sep-

tember, 1880, and continued in business until January, 1883, when it failed.

Q. 24. For about how much did it fail—about what were its assets, and what its liabilities?

Ans. I suppose it had about $60,000 of liabilities and about $100,000 of assets.

Q. 25. Then, why did it fail?

Ans. Because they couldn't realize on their assets.

Q. 26. Did they ever realize on them, & to what extent? What was the value of their assets?

A. They realized very little, if anything, on their assets.
79 They have not been able to realize so far on them, and I suppose that answers the question as to their value.

Q. 27. Has the firm paid any dividend or *pro rata* to its creditors?

Ans. There has been no general distribution. The Manhattan Bank held as collateral a fire policy on the property of one of the debtors of the firm, and has realized on that. There has been no other payment to the creditors of the firm.

Q. 26. Was not the indebtedness of the firm to the Manhattan Bank created under your personal supervision and management of the business of the firm?

Ans. Some of it was; it was not altogether so.

Q. 27. At whose instance and request were loans of the Manhattan Bank to the firm made?

Ans. I negotiated some of them; some of the members of the firm negotiated others of them.

Q. 28. About what proportion of them did you negotiate?
80 Did you not mainly negotiate those loans, and were the loans negotiated by the members of the firm comparatively insignificant?

Ans. I negotiated, perhaps, the greater portion of them—that is, the original loans—but they were renewed, and I did not always attend to them.

Q. 29. Is it not true that that indebtedness of the firm to the Manhattan Bank was mainly created by you as the general manager of the business of the firm; that the bank looked to and relied upon you to protect it, and that you felt morally and honorably bound to do all that you could to protect it?

Ans. I don't know that I felt any more honorably bound to protect that than any other liabilities that I created. I always tried to protect all honorable liabilities that I ever did create. What I
81 mean by honorable is making bank loans. I may say that, perhaps, Mr. Maas, the acting cashier of the bank, on account of personal friendship to me and reliance on my personal integrity, did make loans to the firm to a larger amount than they would have done on the credit of the firm itself.

Q. 30. And did not you, knowing that to be the case, feel bound to protect the bank to a greater extent than any other debt that you created?

Ans. Well, it was always my intention to protect the bank if it was in my power to do so, in case of disaster.

Q. 31. Did not Mr. Maas many times press — to make good the indebtedness of the firm to the bank, insisting upon your personal moral obligation to do so?

Ans. Of course, he tried to get me to reduce the account as speedily as possible, but I don't remember of his using any such remark as insisting on my personal moral obligation.

82 Q. 32. Whether he spoke it out or not, was it not well understood both by you and him that he did look to you to protect the bank?

Ans. Of course I told him I would certainly protect the bank if it was in my power.

Q. 33. And did you not, in fact, use part of your individual means to make good the indebtedness of the firm to the bank; if so, to what amount in value, and when—before or after the failure of the firm?

Ans. The bank held some of my individual collaterals for the indebtedness of the firm. That was prior to the failure of the firm.

Q. 34. What collaterals did the bank hold, & when did you put them up?

Ans. They were some building and loan association stock,

83 and some bank stocks; probably five or six thousand dollars in all.

Q. 35. And what became of those collaterals?

Ans. The Manhattan Bank sold them and placed them to the credit of the *credit of the* firm to reduce the indebtedness of the firm to the bank.

Q. 36. And did you not also pledge your personal diamonds to the bank for the indebtedness of the firm?

Ans. Yes, sir.

Q. 37. And were they also sold and applied to reduce that indebtedness?

Ans. I do not know.

Q. 38. Have you ever gotten them back?

Ans. No, sir.

Q. 39. And did you adopt the same course of sacrificing your personal property to pay any other creditor of the firm?

Ans. I believe not.

Q. 40. How much did the firm owe the bank when it

84 failed, and how much does it owe it now?

Ans. I don't remember either.

Q. 41. Approximate the figures as nearly as you can from memory.

Ans. I have no recollection as to the balance due the bank.

Q. 42. Was it indebted at all; & is it now indebted at all?

Ans. It was and it is.

Q. 43. In answer to 6th direct question you say that the second-mortgage bonds of the Memphis & Charleston railroad & the Miss. & Tenn. railroad were hypothecated at the Bank of Commerce for the benefit of Walker, Sons & Co.; what was the date of that transaction?

Ans. I am informed that the books of the Bank of Commerce

show that the transaction occurred on the 21st of February, 1882; and that is true so far as my memory serves me.

Q. 44. What amount was borrowed on those bonds?

Ans. I think $5,200—the face of the bonds.

85 Q. 45. What were the bonds then worth?

Ans. I don't know exactly what they were worth; they were above par.

Q. 46. Had the interest been always promptly paid on them from the time you held them as agent of the plaintiff?

Ans. I believe so.

Q. 47. And paid to you through the Manhattan Bank?

Ans. Yes, sir; the Manhattan Bank collected the interest for me.

Q. 48. Was any interest on those bonds collected and forwarded to the plaintiff after the pledge made to the Bank of Commerce?

Ans. I think there was; I don't remember that more than once the interest was thus paid.

Q. 49. Were the interest coupons detached before the bonds were pledged to the Bank of Commerce, or only afterwards when paid?

86 Ans. Afterwards when paid. When they were pledged to the Bank of Commerce all unmatured coupons were attached to the bonds, is my recollection.

Q. 50. Who negotiated that loan with the Bank of Commerce, and with what officer of the bank.

Ans. I think I made the negotiations, perhaps, through Mr. Omberg, the cashier of the Bank of Commerce.

Q. 51. Don't you know who made it?

Ans. Well, I know I spoke of it to Mr. Omberg. I think the loan was made through me.

Q. 52. Did anybody else have any agency in making or consummating that loan?

Ans. Perhaps Lee Walker, one of the firm, gave the collateral note. I think he did.

Q. 53. Who delivered the bonds to the Bank of Commerce?

Ans. I believe I did.

Q. 54. Don't you know who did?

87 Ans. As well as I can recollect, I delivered them myself.

Q. 55. When did you deliver them—at the date of the loan?

Ans. About that time; it might have been a day or so before.

Q. 56. Do you not remember that at the time of the loan the bonds or a part of them were not in the city of Memphis, and that they or a part of them were delivered by Maas after the loan had been consummated?

Ans. My recollection is not clear on that. I do remember that I delivered some of them, but whether all or not I do not remember.

Q. 57. What do you mean when you say in answer to 6th direct interrogatory that those bonds were pledged to the Bank of Commerce for the benefit of Walker, Sons & Co.?

Ans. I mean that the money borrowed on the bonds was placed to the credit of Walker, Sons & Co. at the Bank of Commerce.

88 Q. 58. And what did Walker, Sons & Co. do with this money?

Ans. They used it in their business—paid liabilities with it.

Q. 59. Did not the whole or the greater part of that money go to the Manhattan Bank to reduce the indebtedness of the firm to that bank?

Ans. I think shortly after that loan was consummated the Manhattan Bank got some money; I can't say how much nor whether it was that particular money. The firm was selling cotton and making other deposits at the Bank of Commerce.

Q. 60. State your best recollection as to how much it (the Manhattan Bank) got.

Ans. I could not state how much without reference to the books of the bank.

Q. 61. Who delivered the bonds to you to be delivered to the Bank of Commerce?

89 Ans. I think I got them from Maas.

Q. 62. And did he know what you were going to do with them?

Ans. Well, I suppose he did.

Q. 63. Don't you know he did?

Ans. I suppose he knew it from the simple fact that I wanted to make a loan with him and he refused to make the loan.

Q. 65. Do you mean that you applied to him to make a loan on the bonds for the benefit of Walker, Sons & Co., and that he refused?

Ans. Yes, sir.

Q. 66. And did you not tell him when you got the bonds that the loan had been made by the Bank of Commerce, or had been agreed to be made by it?

Ans. I believe Walker, Sons & Co. were doing business at the time with the Bank of Commerce, and I believe I told him

90 we were about negotiating the loan at the Bank of Commerce.

Q. 67. Why did the firm change its business from the Manhattan Bank to the Bank of Commerce?

Ans. The main reason was they could not get the accommodations at the Manhattan Bank that they required.

Q. 68. Was it not that because the firm was already so largely indebted to [the] Manhattan Bank?

Ans. No, sir; I don't think that was the cause.

Q. 69. Then, what was the cause?

Ans. I suppose because the account was not a profitable one to the Manhattan Bank. That bank did not care to have cotton factors' accounts.

Q. 70. How long did the firm keep its account with the Manhattan Bank?

Ans. I don't remember how long. They kept it there some time. I think over a year.

91 Q. 71. Was it before or after or at the time of the loan by the Bank of Commerce on the bonds that the firm opened a general account with that bank?

Ans. It was before the loan on the bonds, but how long before I don't recollect.

Q. 72. Down to the time the account was opened with the Bank of Commerce it was kept at the Manhattan Bank, was it not?

Ans. Yes, sir; it was.

Q. 72. Was it before or after the loan on the bonds by the Bank of Commerce that you pledged your personal stocks & diamonds to the Manhattan Bank?

Ans. The stocks and bond were pledged before the loan by the Bank of Commerce, I know. The diamonds, I think, were pledged later.

92 Q. 73. Did not Maas know or understand at the time you withdrew the bonds for the loan by the Bank of Commerce that the proceeds of that loan were to go to the Manhattan Bank?

Ans. I don't know whether he did or not.

Q. 74. Did you not so tell him or give him so to understand?

Ans. I have no such recollection.

Q. 75. Was not the firm then very largely indebted to the Manhattan Bank?

Ans. They owed some money; I don't remember how much they owed then.

Q. 76. Can't you say about how much they owed then?

Ans. I cannot.

Q. 77. Was it as much as $20,000?

Ans. No, sir; I don't think it was.

Q. 78. Was it as much as $10,000.00?

Ans. Well, I suppose it was; it may have been as much as $10,000.

93 Q. 79. And do you mean to swear that when you withdrew the bonds for the loan by the Bank of Commerce that Maas had no understanding with you that the proceeds of the loan were to be applied to reduce that indebtedness?

Ans. I recollect of having no understanding with him at all.

Q. 80. When you asked Maas to make the loan on the bonds was it not with a purpose to put the proceeds of the loan to the credit of the firm at the Manhattan Bank, and did not Maas understand that such was your purpose?

Ans. The firm was doing business at that time at both places; had not then entirely withdrawn their account from the Manhattan Bank. I might have put the loan to the credit of the firm at the Manhattan Bank. I don't know whether I would or not.

94 Q. 81. Was not Maas your close, intimate, & confidential friend?

Ans. Well, he was a very particular friend of mine. I don't think I told him all I knew.

Q. 82. Did he not at your instance open the books of Walker, Sons & Co.?

Ans. He opened the books of Walker, Sons & Co. I don't know that it was by my instance.

Q. 83. Was he not your & your firm's book-keeper and confidential correspondent before he went into the Manhattan Bank?

Ans. He was the book-keeper of Walker, *Brothers* & Co., of whic I was a member.

Q. 84. Had you or any members of the firm of Walker, Sons & Co. any such intimate friends with the Bank of Commerce as Maas was to you & the firm?

Ans. No, sir; we did not.

95 Q. 85. Did you ever inform the plaintiff of the loan of the $5,000 proceeds of the Goldsmith note and the $5,200 borrowed of the Bank of Commerce to Walker, Sons & Co.? If so, how & when?

Ans. I don't know whether I ever notified her.

Q. 86. Did you ever render to her any accounts or statements of the note & bonds or of the disposition of the same or their proceeds?

Ans. I don't know that I did.

Q. 87. What was done with the receipt executed by the Manhattan Bank of date Nov. 27, 1880, exhibited with Kramer's deposition?

Ans. I don't remember.

Q. 89. Was it in your possession when the Goldsmith note was paid?

Ans. No, sir.

Q. 90. Or ever after that date?

Ans. No, sir.

96 Q. 91. If ever in your possession what did you do with it?

Ans. I don't know that it was ever in my possession; if it was I sent it to Philadelphia to the plaintiff.

Q. 92. Did you ever see the plaintiff after November 27th, 1880, & up to the date of the payment of the Goldsmith note or the loan of the $5,200.00 by the Bank of Commerce?

Ans. I think I did.

Q. 93. When?

Ans. I think in the summer of 1881.

Q. 94. Did you then have any conversation with her about the bonds of the M. & C. & Miss. & Tenn. R. R. Co's?

Ans. Not that I know of.

Q. 95. Did you procure the loan of the $5,200 from the Bank of Commerce and turn over the money to Walker, Sons & Co. in the fair exercise of your judgment as the agent of the plaintiff?

Ans. I did.

97 Q. 96. Did you consider the one investment as good as the other?

Ans. No, sir; I did not.

Q. 97. Then why did you make the change?

Ans. I hypothecated the bonds in order to raise money for Walker, Sons & Co.

Q. 98. Did you take any security from Walker, Sons & Co. or any evidence of the loan?

Ans. No, sir.

Q. 99. When the Goldsmith note was paid and the proceeds placed to the credit of Walker, Sons & Co. at the Manhattan Bank, did you have or exhibit to the bank any evidence of authority as agent of the plaintiff to make such a transaction?

Ans. No, sir.

Q. 100. Did you, so far as you recollect, ever see the receipt of Nov. 27, 1880, or know of its existence prior to the commencement of this suit?

98 Ans. I had no recollection of it prior to the commencement of this suit. I don't remember ever to have seen it prior to the commencement of this suit.

Q. 101. Did you not, as financial & general manager of the business of Walker, Sons & Co., from the inception to the failure of the firm, have frequent consultations with Maas about the condition of the firm and the conduct of its business?

Ans. I expect I had some conversations with him shortly before its failure, but I never had any general conversations with him during its business career.

Q. 102. Did you see Adam Kramer when he was here shortly before this suit was instituted?

Ans. No, sir.

Q. 103. Were you in any manner liable for the indebted-

99 ness of Walker, Sons & Co. to the Manhattan Bank?

Ans. No, sir; I was not.

Q. 104. Did not Maas look to you for the protection of the bank as fully as if you had been personally liable? Did not he rely upon you personally to protect the bank?

Ans. Well, whether he relied on me or not he had a right to expect it from our mutual friendship, and because, as I have already stated, I told him that I would certainly protect the bank in case of a disaster if it was in my power to do so.

Q. 105. Had you any interest in the profits of Walker, Sons & Co.?

Ans. No, sir; I had no interest in the profits of Walker, Sons & Co.

Q. 106. Upon what terms were you connected with that firm; on a salary?

Ans. Yes, sir.

Q. 107. What salary?

100 Ans. $2,500.00 a year.

Q. 108. Was the firm indebted to you on salary account when it failed?

Ans. Yes, sir.

Q. 109. Was it so indebted when the Goldsmith note was paid?

Ans. Yes, sir.

Q. 110. Was it so indebted when the loan of $5,200 was made by the Bank of Commerce?

Ans. Yes, sir.

Re-examined:

1 Q. Did Mr. Goldsmith or any one for him or any one for the Manhattan Bank ever refuse to pay the $5,000.00 note, unless you would lend it to Walker, Sons & Co. to be used by them in paying their indebtedness to the bank?

Ans. No, sir; never to me.

101 2 Q. Had you not heard that Goldsmith intended paying the note & would not renew it before you thought of lending the money to Walker, Sons & Co.?

Ans. Yes, sir; I did.

3 Q. Prior to Oct. '81, the date you loaned the 5,000.00 to Walker, Sons & Co., was not other money loaned to Walker, Sons & Co. for Mrs. Eliza Walker by & with her consent without any security being taken therefor?

Ans. Yes; I believe there was.

4 Q. Did the members of the firm of Walker, Sons & Co. negotiate loans as well as yourself?

Ans. They did.

5 Q. You say the bank held some of your individual collaterals for the indebtedness of Walker, Sons & Co. Did it hold any
102 other security or collaterals belonging to Walker, Sons & Co.?

Ans. Yes, sir.

6 Q. When the 5,200.00 loan was made at the Bank of Commerce on the Miss. & Tenn. and Mem. & Ch. R. R. bonds the amount was entered to the credit of Walker, Sons [&] Co. on their general account in that bank & subject to their check. Is this the way the transaction was had?

Ans. Yes, sir.

7 Q. It seems this loan was made 21 Feb'y, '82. Did any indebtedness of Walker, Sons & Co. to the Manhattan Bank mature that day or about that time?

Ans. I don't recollect of any maturing that day.

8 Q. You say in your answer to 59 X Q. that you think
103 shortly after the loan from the Bank of Commerce the Manhattan Bank got some money. Can you say how long after?

Ans. I don't remember exactly how long after.

9 Q. When the payment then referred to was made — the Manhattan Bank, was it by check on the Bank of Commerce?

Ans. It was by check or checks.

10 Q. Were Walker, Sons & Co. making only deposits from their cotton sales with the Bank of Commerce at this time?

Ans. I believe they were.

11 Q. When Walker, Sons & Co. made the payment or payments after the 21 Feb'y, '82, to the Manhattan Bank, was it done in the usual course of business to meet some maturing debt?

Ans. Of course it was.

104 12 Q. When you went to withdraw the 2nd m'tg'e bonds of the M. & C. R. R. & Miss. & Tenn. R'd from the Manhattan Bank did any officer or agent of that bank demand that you would use any money that you might borrow on them for Walker, Sons & Co. in paying Walker, Sons & Co.'s debt to the Manhattan Bank?

Ans. No one made any such demand of me to that effect.

13 Q. Were they delivered up to you without any condition?

Ans. They were.

14 Q. You say in your answer to X Q. 20, speaking of the loan of the 5,000 to Walker, Sons & Co., that while it was not as good as

collateral, but Walker, Sons & Co. being closely related to pl't'ff, & needing money, I thought it was perfectly safe to let them have it.

Now, did you at the time have any doubt as to its being paid?

105 Ans. I did not.

Recross-examined:

X Q. 1. Can you state how much of the other monies of the plaintiff had already been loaned to the firm of Walker, Sons & Co. at the time of the payment of the Goldsmith note?

Ans. I don't know exactly. It was some $3,000.00, as well as I can remember.

X Q. 2. Did not the plaintiff loan to her son, Ernest Walker, the $10,000 which he put into that business as his capital?

Ans. Yes, sir.

X Q. 3. And did not Maas know that fact at the time the receipt of Nov. 27, 1880, was given, & afterwards?

Ans. I presume he did.

106 X Q. 4. Was not that $10,000 sent here in a check, & that check collected through the Manhattan Bank?

Ans. I believe it was; it was deposited in the Manhattan Bank.

X Q. 5. Where are the books of Walker, Sons & Co.?

Ans. I have got some of them; I don't know where they all are.

X Q. 6. When the $5,200 loan was made by the Bank of Commerce, was not the firm of Walker, Sons & Co. indebted by open account to the Manhattan Bank, which indebtedness was then due?

Ans. They may [have] had some over-checks there in the usual run of business. I do [not] definitely remember how that was.

X Q. 7. Then you do not mean to say that there was not then a due indebtedness from the firm to the Manhattan Bank?

107 Ans. There might have been; I don't know whether there was or not.

X Q. 8. And do you know how the payments made by checks on the Bank of Commerce to the Manhattan Bank were applied; whether to open account indebtedness due at the time of the loan by the Bank of Commerce or to obligations maturing after that date?

Ans. The best of my recollection is that they were applied to payment of bills maturing at the date of the loan by the Bank of Commerce.

X Q. 9. Who loaned the other money of the plaintiff, which you say was about $3,000.00, to the firm of Walker, Sons & Co.?

Ans. I did.

X Q. 10. When; before or after the loan of the $5,000.00 proceeds of the Goldsmith note?

108 Ans. Well, perhaps some of it was before & some of it after it; was not in one amount.

X Q. 11. Do you know of your personal knowledge that the plaintiff consented to or approved that loan or those loans?

Ans. I never heard of any objections to me.

X Q. 12. And is that the only reason why you say the plaintiff, if you mean so to say, that such loan or loans were made "by & with the consent" of the plaintiff?

Ans. I have no other reason to base it on.

X Q. 13. You have said, have you not, that you were general manager of the business of Walker, Sons & Co. from its inception until the firm failed, about January, 1883?

Ans. Yes, sir.

109 X Q. 14. And did Maas know that fact throughout the existence of the firm?

Ans. Yes, sir.

In answer to 3d question on re-examination you say other monies of Mrs. Walker, the p'l'ff, were loaned to Walker, Sons & Co. Did Mrs. Walker know that these loans were made?

Ans. Yes, sir.

And you say she never made any objections?

Ans. No, sir. I answered that before.

Did Mrs. Walker have any security for the $10,000.00 loaned to her son, Ernest Walker?

Ans. None that I know of.

And further saith not.

G. H. JUDAH.

Subscribed & sworn to before me this July 31, 1884.

M. B. TRESWANT,

110 *U. S. Commissioner, Dist. West Tenn., at Memphis.*

(Endorsed:) 384. Equity. Eliza Walker *vs.* The Manhattan Bank. Cross-examination of G. H. Judah. Filed Aug. 6, 1884. Bell W. Ethridge, clk. W. B. Weisiger, D. C.

111 In the Circuit Court of the United States for the Western District of Tennessee.

ELIZA WALKER *vs.* THE MANHATTAN BANK.

Recross-examination of G. H. JUDAH, a witness for the defendant in the above-named suit, taken by complainant by consent of counsel for defendant, subject to objections and exceptions for and incompetency of the evidence only.

Re-X Int. 1. In your examination-in-chief, in your first deposition taken in this case, in speaking of the authority which you had over the fund which you had for Mrs. Eliza Walker, as agent, which was invested in the — and note involved in this suit, you speak of her instructions to you touching these. Now, were these instructions to do anything else but to invest her moneys so as to yield her an income by way of interest?

112 Ans. It was understood that the money was to be invested so as to yield her interest, which she needed for her use.

Re-X Int. 2. Did her instructions directly or indirectly authorize you to pledge any bonds or securities obtained with her money for your own debts or the debts of others?

Ans. No, sir.

Re-X Int. 3. Then when you say in your examination-in-chief

that the control you had of the fund was as complete as over your own property, do you mean to be understood that such control or power extended only to making loans and investments for Mrs. Walker's benefit, and not for your own or any other person's benefit?

Ans. What I intended to say was that my power was limited to invest her moneys for her exclusive benefit and use, and I thought my language would be so understood.

Re-X Int. 4. At what date in 1881 were you at Mrs. Walker's house in Philadelphia?

113 Ans. I don't remember the exact date; if I saw her in 1881 it must have been in August or September or October. I went to Waukesha that season, and after leaving there went East, and I am unable to state the time when I went East.

Re-X Int. 5. On that visit to Mrs. Walker's house who of her family besides herself did you meet there?

Ans. I don't remember; we were on good terms, and I presume I met the whole family.

Examination by counsel for defendant:

Is is not a fact that no special instructions of any kind about the management of this fund was given you, and that it was left to you to manage as your judgment dictated was best?

Ans. Yes; I stated this once before.

Look again at your answer to 7th question-in-chief and say if it is correct.

Ans. It is; of course I was not to appropriate the funds to
114 my own use, but my authority to loan such — collect and reinvest was as unlimited as over my own property.

Did you ever pledge any of the funds for your own use?

Ans. Never.

When you let Walker, Sons & Co. have the use of the bonds did you consider in any other light than as a loan to them?

Ans. I considered it as a loan to them, as I made other loans.

(Signed) G. H. JUDAH.

Oath to this examination considered as made under — to previous examination.

Feb'y 7, '85.

L. & E. LEHMAN,
For Compl'n't.
HARRIS & TURLEY,
For Def'nd't.

[Endorsed:] No. 384. Circuit court of United States, western district of Tennessee. Eliza Walker *vs.* Manhattan Bank. Deposition of G. H. Judah. Re-X examination. Filed Feb'y 19, '85. Bell W. Etheridge, cl'k. W. B. Weisiger, D. C.

115 *Copy of Exhibit to G. H. Judah's Deposition.*

In Circuit Court U. S., at Memphis.

ELIZA WALKER *vs.* MANHATTAN BANK.

PHILADELPHIA, *April* 22, '81.

Mrsrs. Walker, Sons & Co.

DEAR SIRS: Your favor, enclosing exchange, $292.39, on Fourth National Bank of New York, for one hundred and seventy-five dollars, received.

With my regards, I am yours truly,

ELIZA WALKER.

116 *Copy of Exhibit to G. H. Judah's Deposition.*

In Circuit Court U. S., at Memphis.

ELIZA WALKER *vs.* MANHATTAN BANK.

No. 510 N. FIFTH ST., PHILADELPHIA, *Feb'y 7th*, '81.

Mrsrs. Walker, Sons & Co.

DEAR SIRS: Yours of the third ult., enclosing New York exchange to the am't of $168.60, interest on loan, Manhattan Bank, and bonds, received.

My thanks for the same.

Yours truly,

ELIZA WALKER,
Per B. W.

117 *Copy of Exhibit to G. H. Judah's Deposition.*

In Circuit Court of U. S., at Memphis.

ELIZA WALKER *vs.* MANHATTAN BANK.

No. 510 N. 5TH ST., PHILADELPHIA, *Nov. 13th*, '82.

Messrs. Walker Sons & Co.

GENTLEMEN: In reply to yours of the 8th ultimo, I will state that I am more inconvenienced by your tardy fulfilment of contract than I desire to admit. My claim, though minor in your estimation, is as important to me as any heavy disbursement you are compelled to make on time. Please remit at once the October dues. I can make it no more emphatic. The family at home are well. News from Cincinnati is not very encouraging.

With regards, I am, respectfully, yours,

118 ELIZA WALKER,
Per BELLE WALKER,
Attorney.

Copy of Exhibit to G. H. Judah's Deposition.

In Circuit Court of U. S., at Memphis.

ELIZA WALKER *vs.* MANHATTAN BANK.

Received at 1.55 p. m., Nov. 1, 1882.
Dated Philadelphia.
To Walker, Sons & Co., 276 Front St.:
Remit at once. Am short. All well.

BELLE.

119 *Copy of Exhibit to G. H. Judah's Deposition.*

In Circuit Court of U. S., at Memphis.

ELIZA WALKER *vs.* MANHATTAN BANK.

PHILADELPHIA, *Jan'y 17th*, '81.

Messrs. Walker, Sons & Co.

GENTLEMEN: Yours of the 14th inst. containing check of $230, accrued interest, received, for the prompt forwarding of which please accept my thanks.

Yours truly, ELIZA WALKER,
Per B. W.

[Endorsed:] Circuit court of the United States, district of Tennessee. Eliza Walker *vs.* Manhattan Bank. Copy letters ex. to Judah, def'n. Filed Feb. 25th, 1885. Bell W. Etheridge, clk. W. B. Weisiger, D. C.

120 Circuit Court of the United States for the Western District of Tennessee. Equity Docket.

ELIZA WALKER *vs.* THE MANHATTAN BANK.

The deposition of J. A. OMBERG, taken in behalf of the plaintiff this 4th day of August, 1884, at the banking house of the Bank of Commerce. Notice, caption, and all formalities waived, but exceptions reserved as to the competency, relevancy, and materialty of the testimony.

Int'g 1. What is your age, residence, and occupation?

Ans. Residence, Memphis, Tenn.; age, 24 years, & am cashier of the Bank of Commerce.

Int'g. 2. How long have you been cashier of the Bank of Commerce?

Ans. Since the 9th day of June, 1879.

121 Int'g 3. Did the Bank of Commerce, on the 21st day of February, 1882, make a loan of money to the firm of Walker, Sons & Co.? If yea, please state all the particulars of that loan, viz., the amount of the loan, the character of the obligation given to the bank by the firm of Walker, Sons & Co., and how that obligation was secured. If you have the original or a renewal of the

original obligation given by the said firm to the bank, please produce it and file a copy thereof as an exhibit to this deposition.

Ans. The Bank of Commerce did make a loan to said firm of Walker, Sons & Co. on the 21st day of February, 1882. The loan was $5,200. On the day named the firm executed to the bank a note for $5,200.00, of which the last renewal is yet in possession
122 of the bank and a copy of which I file as Exhibit "A" hereto. The original was dated Feb. 21st, 1882, but in all other respects was exactly the same as Exhibit "A." Said note was secured by a deposit with the bank as collateral security — $3,000.00 of the 2nd-mortgage bonds of the Memphis and Charleston R. R. Co. & $2,200.00 of the 2nd-mortgage bonds of the Miss. Central R. R. Company.

Int'g 4. By whom was the loan negotiated on the part of the said firm and on that of the bank?

Ans. By myself on the part of the bank and by Judah, I think, on the part of the firm. Judah was in the habit of attending to their business here, and I think it was he; am quite sure that it was.

Int'g 5. Has said $5,200.00 been repaid to the bank? If so, state how, giving all the particulars.

123 Ans. We sold the collaterals at public auction on the 3rd day of March, 1883, and the loan was repaid on that day by the proceeds of the sale.

The Memphis & Charleston 2nd-mortgage bonds sold for 100½, realizing $3,015.00, and the $2,200 Miss. Central 2nd-mortgage bonds at 104½, realizing $2,299.00.

Intg. 6. Were said bonds delivered at the time of said loan of $5,200 to Walker, Sons & Co.?

Ans. They must have been; at least our books so show it, and I think the bonds were delivered at the time the transaction was consummated and the $5,200 loaned. But my recollection is that we had agreed to make the loan, and that Judah brought over the Miss. Central bonds, but did not have the Memphis & Charleston bonds; that instead of the latter he had a statement or ac-
124 knowledgment, by L. Levy, I think, that he (Levy) held the bonds in New York, deliverable on the return of that certificate. I think I declined to consummate the transaction until the bonds were delivered; but I find, from a new examination of our books, that Walker, Sons & Co. were overchecked about $5,800 when the transaction was consummated, and I must have allowed that temporarily on the faith of the Miss. Central bonds & Levy's acknowledgment. At all events I carried the receipt to Maas and he sent it (Levy's acknowledgment) to New York, and got the Memphis & Charleston 2nd-mortgage bonds and delivered them to this bank, when the transaction was consummated.

Intg. 7. Do you remember having any conversation with Maas relative to these bonds prior to & about the time of the loan
125 in which he assured you that the bonds would be delivered?

Ans. I remember that, when Levy's certificate was tendered instead of the M. & C. bonds, Maas assured me that the bonds

would be delivered. I don't mean to say that Maas came to this bank to give that assurance. My recollection is that I went over to see him at the Manhattan Bank, and that he there assured me that they would certainly be delivered.

Int'g 8. Did Maas know that you were making such inquiries with a view to lending $5,200, or any other amount, on the bonds?

Ans. I don't recollect whether I explained to him the object of my inquiries or not. I wanted to consult him also as to the value of the bonds. He knew that I was making the inquiries
126 with a view to making the loan, but whether I told him, or he already knew it, I don't remember. I have no doubt I told him, in explanation of why I was there.

Int'g 9. Was Judah present at that or any other interview between you & Maas on the subject of that contemplated loan?

Ans. I don't remember.

Int'g 10. Did Judah refer you to Maas in that matter?

Ans. In connection with Levy's receipt for the $3,000 of M. & C. bonds, I think he did.

Int'g 11. Do you or can you from the books tell whether any part or the whole of the proceeds of the loan was turned over by Judah or by Walker, Sons & Co. to the Manhattan Bank?

Ans. I don't know; I can't tell from our books; and at the request [of] counsel I here attache a copy of the account
127 of Walker, Sons & Co. with this bank, marked Exhibit "B," to this deposition.

Int'g. 12. Did Maas ever tell you, before said loan by this bank, that a part or the whole of the loan was to go to the Manhattan Bank; or did he ever tell you, after the loan, that that bank had gotten a part or the whole of the money loaned by you to Walker, Sons & Co.?

Ans. I don't think he ever did; I don't remember ever to have had any conversation with him about the matter after the loan.

Int'g. 13. Why do you think, from the fact that Walker, Sons & Co. were allowed to become overchecked with this bank to the amount of about $4,500.00 shortly before the 21st of Feb'y, 1882, that you must have permitted it temporarily on the faith of
128 the bonds & of Levy's certificate?

Ans. I presume that that is so from the fact that I would not have let them have the money without security.

Int'g. 14. Why would you not?

Ans. It would have been contrary to our general custom.

Int'g. 15. Was transfer made by Judah or by the firm of Walker, Sons & Co. of the surplus that might remain of the proceeds of said bonds after paying the obligations held by your bank?

Ans. I don't know of any such transaction. I do remember that Vendig, before the bonds were sold, wanted to make an arrangement by which the surplus could be applied to a note of Walker, Sons & Co. endorsed by him; that is about all I recollect about it.

129 Int'g 16. Do you remember when you went to see Maas, before the loan was consummated, what he, Maas, said in reference to the value of said bonds—at what value he put them?

Ans. I consulted him about the value, and he gave me the market value. I don't remember the figures, but do remember that the value was put above par, and that I was satisfied that we could safely lend the face value of the bonds.

Int'g 17. Who was the L. Levy to whose certificate you have referred? Where was his place of business, & what his connection with the Manhattan Bank?

Ans. The Levy to whose certificate I refer was Levy, formally of Levy & Borg, of New York city. I think the firm of Levy &
130 Borg had then dissolved. Levy & Borg at one time owned the Manhattan Bank, but what connection Levy had with the bank, if any, on the 21st of Feb'y, '82, I don't know.

Cross-examination waived for [the] present, with right to cross hereafter if desired.

T. B. TURLEY, *Att'y.*

And further deponent saith not.

J. A. OMBERG, *Cash'r.*

Subscribed & sworn to before me this Aug. 4, 1884.

[SEAL.] M. B. TREZEVANT,
Notary Public.

(Endorsed:) Eliza Walker *vs.* The Manhattan Bank. Deposition of J. A. Omberg. Filed Aug. 6, 1884. Bell W. Etheridge, c'k. W. B. Weisiger, D. C.

131 "Ex. A."

$5,200. MEMPHIS, TENN., *Oct. 18th*, 1882.

Three months after date we promise to pay to the order of ourselves, at the Bank of Commerce, in Memphis, Tenn., fifty-two hundred dollars, *at the Bank of Commerce, in Memphis, Tenn.*, for value received, having deposited as collateral security $2,200 Miss. Cent. 2nd-mortgage bonds, $3,000 M. & C. R. R. 2nd-m't'ge bonds, & in case this note shall not be paid when due the holder is hereby authorized to sell the said collaterals, or any part thereof, at any time thereafter, at public or private sale, without advertising the same or giving any notice, & to apply the net proceeds, after paying all expenses, to the payment of this note, & if at any time before the maturity of this note said collaterals should depreciate below their present value, which is to-day estimated at at least 5 per
132 cent. more than this debt, the said holder shall have the authority to demand additional security, & if not furnished when so demanded, either in person or through notice left at our place of business or residence, or notice through the post office, the holder is hereby authorized to sell said collaterals at any time thereafter in the manner heretofore stated. It has also agreed that the holder of this note is to retain a full lien on the above-mentioned collaterals for any other debt due or to become due by us to the holders hereof. It is further agreed that in case of litigation all

court expenses & attorneys' fees shall be paid by the maker of this note.

Feb'y 24, '82.

WALKER SONS & CO.

(Endorsed :) Walker Sons & Co.

133 *Exhibit "B" to J. A. Omberg's Deposition.*

"Ex. B."

Walker, Sons & Co. in account with Bank of Commerce, Memphis, Tenn.

Please examine & report at your earliest convenience.

The account of Walker, Sons & Co. first commenced with the Bank of Commerce June 7th, 1881. This statement commences with the balance of Feb'y 6, 1882, as shown by the ledger, & itemized to Oct. 14, 1882.

1882.	Dr.			1882.	Cr.		
Feb'y 6.	Dr. balance		1,177 51	Feb. 7.	Dep.		400 80
7.	Int.		11 93	21.	Disc't		5,091 38
11.	C'ks		985 80	23.			636 11
14.			1,000	24.			235
16.			1,500	28.			1,000
18.			800 62	M'ch 4.			2,247 72
20.			810 13	6.			181 70
27.			500	10.			520
28.			50	"			154 01
M'ch 1.		200 13		11.			1,000
		200		13.			519 20
			400 13	14.			307 32
2.		33 71		16.			223 65
		75		18.			795 04
			108 71	22.			1,747 25
4.		1 50		23.			910
		2,500		29.	Demand loan		650
			2,501 50	"			1,500
7.		25		Ap'l 3.			500
		65		4.			2,800
		65		8.			1,741 66
			155	10.			2,000
10.			112 55	27.			235 74
11.		520		May 1.			1,000
		180		9.			500
			700	10.			2,500
13.		100		16.			1,000
		1,000		18.			1,114 66
			1,100	22.	Disc't		499 35
15.		25	26	24.			5,139 91
16.		25	25	27.			2,200
18.	Cert. c'k	2,500	2,500	Jun. 10.			1,300
22		1,747 25	1,747 25	17.			1,270 14
29.			1,320 71	July 12.			1,600
30.		505		13.			2,000
		50		15.			5,092 53
			555	17.			500
Ap'l 3.			250	26.			1,310 67
4.		1,266 03					
		1,500					
			2,766 03				

1882.	Dr.		1882.	Cr.	
Ap'l 5.					125
8.					1,750 00
10.		41 44			
		2,000			
					2,041 44
13.					100
134					
May 2.					403 65
4.		503 31			
		20 70			
		47 72			
					571 73
5.					275 13
6.					66 20
9.					50
10.		2,200			
		50			
		205 48			
		75			
					2,530 48
11.					134 89
15.					175
17.					230 75
18.					2,000
19.					174 94
22.					280 53
24.		67 41			
		5,200			
					5,267 41
27.					500
29.					1,511 68
June 5.					58 05
10.					782 45
12.		15			
		500			
					515
17.					607 15
19.		498 74			
		50			
					548 74
21.					233 10
26.					541 60
July 12.		50			
		359 75			
					409 75
13.		130			
		507 67			
					637 67
14.		1,600			
		26 40			
					1,626 40
15.					5,250
17.		150			
		100			
					250
18.					100
20.					50 00
26.		35 50			
		50			
					85 50
	Am't for'd	50,987 11		Am't for'd	52,423 24

135

1882.	Dr.			1882.	Cr.	
	Am't for'd		50,987 11		Am't for'd	52,423 24
July 27.		45 15				
		19 86				
			65 01			
31.			20			
Aug. 2.		232 27				
		78 14				
		38 15				
		28 90				
			377 46			
3.		45 43				
		100				
			145 43			
4.			35			
7.			421 95			
8.			45			
11.			326 28			
			52,423 24			52,423 24
Aug. 12.			60		Balance	326 28
14.			96 20			
16.			567 95			
19.	Int.		17 02			
29.			30			
30.			454 10			
31.			275			
Sept. 1.			101 25			
2.			181 20			
5.		65				
		35				
		35				
		315 51				
			450 51			
6.			706 90			
8.		166 68				
		40				
			206 68			
11.			571 38			
13.			50			
16.			50			
18.			63 73			
19.			2,616 82			
20.			78 25			
21.			32			
26.			50			
30.			50			
Oct. 2.			35			
3.			67 53			
5.			90 25			
6.			175 31			
7.			545 80			
9.			125			
11.			297 70			
12.			926 90			
136 14.			740 36			
			9,712 84			9,712 84
Oct. 14.	Dr. balance		614 44			

137 *Deposition of Maurice Maas. Filed Sept.* 22, '84.

Circuit Court of the United States, Western District of Tennessee.

ELIZA WALKER *vs.* THE MANHATTAN BANK OF MEMPHIS.

Deposition of MAURICE MAAS, taken by consent at Saint Louis, Mo., to be used on behalf of defendant. Exceptions waived as to all matters except for incompetency and irrelevancy. Taken on the 18th of Aug., 1884.

1 Q. Were you ever connected with the defendant, The Manhattan Bank? If so, for how long and in what capacity?

Ans. I was connected with it first as assistant cashier from 1st July, 1880, to latter part [of] March, 1881; from that time, dur-
138 ing the absence of the regular cashier, I was acting cashier, up to 30 Sept., '83, at which date my connection with the bank closed.

2 Q. Where do you reside now, & what business are you engaged in?

Ans. In St. Louis, and engaged in mercantile business as manager of the firm of Leubrie Bros.

3 Q. Do you know the compl't in this case, & how long have you known her?

Ans. I know the compl't personally; I met her several times in Philadelphia when I was there in summer of 1878; I never knew her personally before that date, altho' I knew of her before that time.

4 Q. Did the compl't ever reside in Memphis?

Ans. I have heard that she lived there, but it was long before I knew anything of her.

139 5 Q. Did you ever know of her being in Memphis after you became personally acquainted with her in 1878?

Ans. I know she was never there after I became acquainted with her in 1878; I have never seen her since 1878.

6 Q. Do you know G. H. Judah, whose deposition has been taken in this case? If so, how long have you known him?

Ans. I do; have known him since 1874.

7 Q. While you were connected with the Manhattan Bank what account did G. H. Judah keep there? If you say he kept only one, in what name or how was it kept?

Ans. While I was connected with the Manhattan Bank Mr. G. H. Judah kept an account there as G. H. Judah, guardian.

140 8 Q. How long did he keep that account there?

Ans. I think he kept it there up to Jan'y, '83, as well [as] I can recollect.

9 Q. Look at the receipt or copy of receipt, Ex. A to Adam Kramer'- dep. herein, & tell, if you know, who made the loan to E. Goldsmith represented by the $5,000 note & 4 int. notes amounting to $325.00 mentioned in said receipt.

Ans. Mr. G. H. Judah.

10. Q. Do you know how the loan was made; from what account did Judah draw the money to make it?

Ans. He drew it from the account which he kept with the Manhattan Bank as G. H. Judah, g'd'n. He gave a check against that account for the same.

11 Q. Do you remember how the note was made payable? If so, state to whom it was made payable.

141 Ans. As far as I recollect it was made payable to G. H. Judah, agent, without stating who he was agent for.

12 Q. At whose instance were the $3,000.00 Mem. & Charleston railroad 2d-m'tg'e bonds mentioned in said receipt bought?

Ans. G. H. Judah.

13 Q. How did he pay for them; from what acc't?

Ans. The same was as the loan to Goldsmith; they were bought before the loan to Goldsmith.

14 Q. About how long before the money was loaned to Goldsmith did he buy these bonds?

A. I think about 8 or nine months before.

15 Q. Where were these bonds bought?

Ans. He bought them thro' the Manhattan Bank in the New York market. I mean he gave the Manhattan Bank the

142 order for the bonds, and the bank bought them in New — thro' their correspondents, Levy & Borg.

16 Q. Who bought the Miss. Cent. R. R. bonds & People's Ins. Co. stock mentioned in said receipt, and from what account were they paid for?

Ans. They were bought by G. H. Judah at various times during summer & winter of 1880, and were paid for, some by checks on the account which he kept with the Manhattan Bank as guardian, and some by redemption of certificates of deposit he held as g'd'n in said bank; one certificate may have been in name of E. Goldsmith.

17 Q. While Judah was making these investments, did you ever hear of his ever consulting any one as his principal, or having to get authority from any one before he made them?

Ans. I never did.

143 18 Q. Did you give the receipt, a copy of which is made Ex. A to Kramer's deposition? If so, state the circumstances under which it was given.

Ans. I did, a few weeks after the loan was made to Goldsmith. Mr. Judah came to me while I was standing at my desk working at my books and said he wanted a receipt, or a statement rather, of what securities he had there on special deposit to send to Mrs. Walker in Philadelphia. He had bo't a few days before, out of some funds left to his credit on the g'd'n acc't mentioned above, some $2,500 or $2,600 People's Ins. stock, eleven hundred dollars of which he had placed in name of Eliza Walker, I think, & the balance, I think, he had placed in my name. He said Mrs. Walker wanted to know what she held, altho' we never gave receipts for special de-

144 posits. I attached no importance to it all, considering it merely a memorandum, and without consulting Mr. Goldsmith, the regular cashier, who was writing at the time at his desk, handed Mr. Judah the statement; these are the facts as far as I recollect. He enclosed it, I think, in an envelope & put it on the

desk with the bank's mail to go off that evening. About that time, on our special deposit book, these bonds & note & stock mentioned in said receipt were entered as deposited by G. H. Judah, ag't Mrs. Eliza Walker, & the other People's Ins. Co. stock which stood in my name were entered as deposited by G. H. Judah, ag't Mrs. Sarah Walker. Previous to that time I think they stood as deposited by Mr. M. Maas, but I held them for him as guardian; I think that is the way they were deposited; the deposit book will show.

17 Q. After giving this statement, did you ever hear any-
145 thing from Mrs. Eliza Walker on the subject?

Ans. I never heard, saw, or thought anything of the statement again until about 27 Dec., 1882, when Mr. Kramer brought it to Memphis & showed it to me.

20 Q. Did the note, bonds, & stock remain in Judah's control just as they did before?

Ans. They did.

21 Q. Who collected the interest on the Goldsmith note—I mean the 4 notes mentioned in said receipt, making the $325.00—& who collected the coupons on the bonds & dividend on the stock after Nov. 27, 1880?

Ans. G. H. Judah would come to me, get the notes & coupons out the package they were in as they fell due, & collect them.

22 Q. Did compl't, or any one for her, ever object to this, or ever call on you or the bank for these notes or interest coupons?

146 Ans. No, sir.

23 Q. Do you know anything about Goldsmith being asked or desired to renew the 5,000.00 note when it matured, & what he did about it?

Ans. I remember hearing Mr. Judah speak about it. I am under the impression that Mr. Goldsmith, some time before the loan matured, wrote that he could not renew it, but preferred paying it off.

24 Q. State what, if you know just what, was done with said note or its proceeds.

Ans. About a week or ten days before the note matured Walker, Sons & Co. had a note due at the Manhattan Bank for $6,000.00. I think Mr. Judah came to the bank and asked us to hold up the note till the 1st Nov., when the Goldsmith note fell due; that he could then use the 5,000.00 from the Goldsmith note, & the
147 proceeds of some cotton he expected to sell to take up the note.

I believe I then suggested or told him, the bank not wishing to carry any past-due bills, to have the Goldsmith note discounted then & make a new loan for ten days for the balance to provide for the $6,000 note. He said he needed a few hundred dollars to meet drafts that day, & I think I discounted for him that note of Goldsmith & a note for $1,500.00 of Walker, Sons & Co., which latter note he secured me with warehouse receipts. Six thousand dollars of the proceeds went to pay the six-thousand-dollar note due from Walker, Sons & Co. to the bank that day & the balance, less the discount, I handed over to him over the counter.

25 Q. How was the disc't made of the $5,000.00?

Ans. I attach herewith a copy of the entry made of said
148 discount as Ex. A to my deposition. I think it is correct.

26 Q. Did the compl't, or any one for her, ever write to you or the bank, or ever make any enquiry of any kind about the Goldsmith note up to — time Kramer came to Memphis, Dec. 27, '82?

Ans. No, sir.

27 Q. What became of the Mem. & Chas. 2-m't'ge bonds & Miss. Cent. R. R. bonds mentioned in said receipt?

Ans. I handed them to Mr. Judah.

28 Q. Where were the M. & Ch's. R. R. bonds when he called for them?

Ans. They were in New York in the hands of Levy & Borg, who have held them ever since their purchase. They were represented in the special deposit by Levy & Borg- receipt for them in my name.

29 Q. What became of the People's Ins. Co. stock mentioned
149 in said receipt?

Ans. It was also handed to Mr. Judah together with the bonds.

30 Q. It seems from Mr. Judah's deposition that he used these bonds as collateral for a 5,200.00 loan made by Walker, Sons & Co. at the Bank of Commerce on or about 2 Feb'y, '82. Was any of the proceeds of this loan paid to the Manhattan Bank by Walker, Sons & Co. or by Judah on the indebtedness of that firm to the Manhattan Bank?

Ans. None of the money realized from the loan out of the Bank of Commerce on these bonds was paid to the Manhattan Bank. If I remember right Mr. Judah told me Walker, Sons & Co. were overdrawn at the Bank of Commerce at the time the loan was made.

31 Q. When was the first payment made by Walker Sons to the Manhattan Bank after 21 Feb'y, 1882?

150 Ans I think it was about the 8th April, 1882; it amounted to between $1,800.00 and $1,900.00.

32 Q. When the bonds & People's Ins. Co. were delivered up to Judah, as stated above by you, were any conditions attached to the delivery?

Ans. No special conditions were made. I did not doubt his authority or require him to bring me any authority to withdraw them, but gave them up to him believing he had authority to control them.

33 Q. When did Walker, Sons & Co. quit keeping their account with the bank & why?

Ans. They quit during the summer of 1881; I think during June or July. It was already in March, '81, when Mr. Goldsmith left. We spoke about the account as we did on all accounts & concluded that this account, as well as several others, cotton
151 factors' acc'ts which we had on our books, required too much money in loans, and more than was healthy for *our* institution with small capital like ours; and shortly after that I spoke to Mr. Judah & told him how we felt about the account, and advised him to take their account to some other bank. He told me he would do so as soon as he could make some favorable arrangements in

another bank. He took their acc't to — Bank of Commerce & afterwards kept their regular account there. Their account on our books after that was merely in renewing & reducing their debt to us.

34 Q. Returning to the $6,000.00 note of Walker, Sons & Co., part of which was paid with the proceeds of the Goldsmith note, as stated by you above, did the Manhattan Bank have any collateral for that note?

Ans. Yes, it did; they had some of Walker, Sons & Co.-
152 country paper as collateral for it.

35 Q. You have stated that the M & Ch. R'd bonds were in New York until Judah withdrew them. Did you send to New York for the bonds; if so, who for?

Ans. When Mr. Judah withdrew the special deposit, consisting of the Miss. Cent. R'd bonds & M. & Ch. bonds & People's Ins. Co. stock, he took the receipt of Levy & Borg for the Mem. & Ch. bonds. Afterwards Mr. Omberg, cashier of the Bank of Commerce, bro't over the receipt to me, and asked me if it was good. I told him it was, and at his request I sent the receipt on to New York, and had the bonds sent out, & turned them over to Mr. Omberg.

36 Q. Then, as the matter stands, out of all these securities the only money which Judah used for Walker, Sons & Co. in paying any of their debts to the Manhattan Bank was the proceeds
153 of the Goldsmith $5,000.00 note?

Ans. Yes, sir.

37 Q. Did the Manhattan Bank hold collaterals for all its loans to Walker, Sons & Co.?

Ans. It held general collaterals for all its loans to Walker, Sons & Co., consisting of warehouse receipts, stock, & paper executed to Walker, Sons & Co. by their customers.

38 Q. Were these collaterals deemed sufficient at the time the loan was made?

Ans. Yes, sir.

X Examination by counsel for complainant:

X Int. 1. Prior to Feb'y 1st, 1880, in what business were you engaged?

Ans. From April, 1877, up to November 18th, 1879, I was in the employ of Walker, *Bros.* & Co. as their book-keeper & confiden-
154 tial clerk, and from that date up to my employment by the bank I was in the employ of S. Vendig, assignee of Walker, *Bros.* & Co.

X Int. 2. Was G. H. Judah a member of the firm of Walker, *Bros.* & Co. during your connection with them as book-keeper & confidential clerk?

Ans. Yes, sir.

X Int. 3. In 1880, when you went into the employ of the bank, and afterwards, were your relations with G. H. Judah friendly and intimate?

Ans. Always.

X Int. 4. Before Nov. 27th, 1880, had any receipt or certificate

been given by the bank for notes, bonds, or securites left there by Mr. Judah?

Ans. No, sir.

X Int. 5. How many such did you give on that date?

Ans. Only one.

155 X Int. 6. Was that the same which is referred to by Mr. Kramer in his deposition in this cause?

Ans. Yes, sir.

X Int. 7. Was that forwarded to Mrs. Eliza Walker, the complainant, to her address by mail, under cover of the envelope of the Manhattan Bank?

Ans. It was.

X Int. 8. Did any letter accompany it?

Ans. No; not that I know of.

X Int. 9. Did you or any other officer of the bank, to your knowledge, ever make application to Mrs. Walker for directions or instructions touching the disposition of the items named in said certificate?

Ans. Never.

X Int. 10. Did you or any other officer of the bank ever
156 receive any information from Mrs. Walker touching Mr. Judah's authority to dispose of, deal with, or otherwise interfere with any of the items mentioned in said certificate or receipt?

Ans. No, sir.

X Int. 11. Then in dealing with Mr. Judah touching said items, after the transmission of the receipt to Mrs. Walker, his authority was taken for granted from the previous course of dealing and from any communication or intimation thereof by Mrs. Walker?

Ans. Yes, sir.

X Int. 12. Was any mention made to Mr. Judah of said receipt either at the time of the satisfaction of the $5,000 Goldsmith note or when the bank parted with the railroad mortgage bonds?

Ans. No mention thereof was made by either of us. I attached no importance to it, & no other officer of the bank knew of
157 it; in fact, I had forgotten all about it.

X Int. 13. Was the fact of your having forgotten the receipt on these occasions, or your attaching no importance to it, the cause of its not being then mentioned?

Ans. Both did—my not thinking of it & not attaching any importance to it.

X Int. 14. When Mr. Adam Kramer called on you in December, 1882, with the certificate, did he demand the items therein mentioned?

Ans. No; he did not; he came & saw me & called me back in the office. I was glad to see him. I asked him what bro't him to Memphis, & he told me the Walker business; that Mrs. Walker was without a cent; that Mr. Judah hadn't sent her any money for a long time for interest & he came here to see if
158 he couldn't get some money; he then pulled out the receipt and asked me if I still had those bonds and securities. I was exceedingly surprised at the existence of the receipt, and that he

should not be aware of the bonds having been given up to Mr. Judah, and when I told him that the bonds had been delivered to Mr. Judah he said, I thought so.

X Int. 15. In that interview did you tell Mr. Kramer that you had written the certificate and sent it to Mrs. Walker?

Ans. I did not; I told him that I had written the certificate.

X Int. 16. In that interview or at any other time or place did you tell Mr. Kramer in words or substance that you had forgotten that you had issued the certificate, and in the meantime you had given the bonds and stock to Mr. Judah, and that if you had remem-
159 bered the issuance of the certificate you would not have done so?

Ans. I did not; I told Mr. Kramer I had forgotten all about the certificate, which was at a subsequent visit to the December interview, and after [the] Walkers had failed; I then told him that if I had known the certificate was out I would have demanded it back.

X Int. 17. Did you then tell Mr. Kramer that if you had known the certificate was out you would have demanded it back before consenting to give the bonds to Mr. Judah?

Ans. No; I told Mr. Kramer that I had consulted both the president of the bank & our attorney before delivering the bonds, and that when I delivered them I took a receipt from G. H. Judah, which I considered sufficient.

160 X Int. 18. Why did you tell Mr. Kramer, as above stated, that you would have demanded back the certificate?

Ans. As a matter [of] form *of*, because I would not want any receipt of the bank to be outstanding after the value thereof had been delivered to an agent, even knowing that the receipt could have no importance when I held a receipt of delivery against it.

X Int. 19. Then in point of fact the statement to Mr. Kramer that you have demanded back the certificate was immaterial & unnecessary; is that so?

Ans. Yes, sir.

X Int. 20. About which transaction was it that you told Mr. Kramer you had consulted the president & attorney of the bank, the payment of the Goldsmith note or the delivery of the bonds?

Ans. The delivery of the bonds.

161 X Int. 21. In point of fact about which of those two transactions did you consult the president & attorney?

Ans. Only touching the delivery of the bonds.

X Int. 22. How soon after Mr. Judah applied to you for the bonds did you have such consultation?

Ans. The same day he wished us to make a loan on the bonds.

X Int. 23. For whom did he ask the loan, for himself or Walker, Sons & Co.?

Ans. For Walker, Sons & Co.

X Int. 24. Why did you refuse to make such loan to him on those bonds?

Ans. Because Walker, Sons & Co. were not doing business with the bank any longer & we could use our money to better advantage.

162 X Int. 25. Was that the only reason?

Ans. That was the only reason.

X Int. 26. Then, if Walker, Sons & Co. had at that time been doing business with the bank, you would not have hesitated to loan Mr. Judah money for them on those bonds?

Ans. I would not.

X Int. 27. How soon after you declined to make the loan did Mr. Judah take the bonds away from the bank?

Ans. Only a few days after. He stated at the time I refused to make the loan that he could get the money at the Bank of Commerce.

X Int. 28. When you declined to make the loan did Mr. Judah tell you he would raise money on the bonds elsewhere for Walker, Sons & Co.?

163 Ans. Yes, he did; he said he probably could get the money at the Bank of Commerce.

X Int. 29. When Mr. Judah finally called for the bonds did he tell you that he had arranged with the Bank of Commerce to advance money on them for Walker, Sons & Co.?

Ans. He told me he got the money at the Bank of Commerce, & I supposed it was for Walker, Sons & Co.

X Int. 30. Then, when you handed Mr. Judah the bonds you knew that he took them for a loan to be made by the Bank of Commerce to Walker, Sons & Co.?

Ans. Yes, sir.

X Int. 31. Did you then know that Mr. Judah was the agent of Walker, Sons & Co.?

Ans. I did.

X Int. 32. You were aware of the fact that he had been the agent of that firm from its creation?

164 Ans. Yes, sir.

X Int. 33. Did you hand Mr. Judah all the bonds & stocks at one time?

Ans. I did; but the Charleston R. R. mortgage bonds were represented by a receipt.

X Int. 34. Did you see Mr. Omberg, the cashier of the Bank of Commerce, about the receipt for the Charleston R. R. bonds?

Ans. Mr. Omberg called on me & requested me to send the receipt on & get the bonds.

X Int. 35. Did Mr. Omberg then tell you of the arrangement with his bank under which these bonds were wanted?

Ans. He told me that he had loaned some money on them, and asked whether they were worth over par, & I told him they were quoted about 103 or 104.

165 X Int. 36. Did he tell you that he had loaned money on them to Walker, Sons & Co.?

Ans. He did not; he told me I suppose you know this receipt, & I said it is ours.

X Int. 37. Did you assure Mr. Omberg that if he loaned the money the bank would get the Charleston bonds & turn them over to him?

Ans. There was no question about the loan; he had already made

it. I only told him I w'd send for the bonds; that the receipt was as good as the bonds.

X Int. 38. Did you tell Mr. Omberg anything about Mrs. Walker's ownership of the bonds?

Ans. No, sir.

X Int. 39. Did you in any way mention her to Mr. Omberg in connection with those bonds?

Ans. I did not.

X Int. 40. Was Mr. Judah the manager of the business of
166 Walker, Sons & Co., to your knowledge, from the creation to the end of that firm?

Ans. Yes, sir.

X Int. 41. Did you, when the firm of Walker, Sons & Co. come into existence, open their books for them?

Ans. I did.

X Int. 42. At the request of Mr. Judah?

Ans. Yes, sir.

X Int. 43. Did the Manhattan Bank at any time advance money to Walker, Sons & Co. without collateral security?

Ans. Not to my recollection.

X Int. 44. What was the financial condition of that firm on Feb'y 21, 1882?

Ans. I wasn't then keeping books for them any more, and couldn't tell from my own knowledge what their condition was.

167 X Int. 45. At that date what was their financial reputation?

Ans. Well, their reputation in the general market was never strong from the beginning, but I knew their credit in New York at that time was still good, and it was only a few months afterwards that Mr. Judah obtained a discount of over $20,000 in New York for the firm.

X Int. 46. At that date how did you yourself regard the firm?

Ans. I considered, from what Mr. Judah told me, that while their standing then, in my opinion, wasn't such that I, as a merchant, w'd like to be in, that they had entirely too much money out in the country for their business, but with the promised aid from New York, which eventually they obtained, they would be able to work along pleasantly until the next fall, when, from cotton shipments, they could work out & reduce their outstanding accounts.

168 X Int. 47. On Feb'y 21st, 1882, did you have implicit confidence in the firm?

Ans. I never have implicit confidence in any firm, but their character & general condition of their business made them appear trustworthy to me.

X Int. 48. Did you know at that time that they had pressing need for money?

Ans. They had ordinary need for money, like other merchants, but can't say that it was matter of life or death with them.

X Int. 49. When Mr. Judah applied to you for a loan on the bonds why did you call on the attorney of the bank for advice on the subject?

Ans. Our attorney & the president were in the office at the time Mr. Judah applied for it, and I ask[ed] the president if we should accept the loan; we then spoke to our attorney, and he said
169 the loan w'd be all right. The president thought, however, we could make better use of our money, and said Mr. Judah could make the loan elsewhere.

X Int. 50. Was the matter mentioned to your counsel as one calling for his legal opinion?

Ans. Not specially so.

X Int. 51. Was it so presented to him in any wise?

Ans. Merely told him the circumstances of the deposit.

X Int. 52. Was he told of the certificate which had been sent to Mrs. Walker?

A. No, sir.

X Int. 53. Did Judah call on you for the discount of the Goldsmith note before the day of the maturity of [the] $6,000 note of Walker, Sons & Co.?

Ans. Yes, sir; about two or three days before.

170 X Int. 55. Was it then agreed that you should discount the Goldsmith note & apply the proceeds, as was finally done, to the note which your bank held of Walker, Sons & Co.?

Ans. I remember speaking about it; but whether it was then agreed upon I don't remember.

X Int. 55½. When Mr. Judah consummated the arrangement under which the Goldsmith note was thus applied what authority did he exhibit to you or the bank authorizing him to do so?

Ans. None whatever.

X Int. 56. Did he ever exhibit any authority to you or the bank to dispose of the note & the bonds & securities mentioned in the certificate which was sent to Mrs. Walker?

Ans. He never exhibited any authority when he made the loan to Mr. Goldsmith or at any time afterwards.

171 X Int. 57. What connection did Levy & Borg have with the Manhattan Bank at the time of the transaction with Mr. Omberg?

Ans. L. Levy, who was the successor of Levy & Borg, was a large stockholder in the Manhattan Bank & a director, and their agent to purchase & sell bonds in New York.

X Int. 58. How much stock did L. Levy control of the bank?

Ans. He controlled, with his own & his brother's, about $42,000 of the stock. The capital stock of the bank was $106,000.

X Int. 59. L. Levy had been the president of the bank?

Ans. At one time.

X Int. 60. Who managed the $5,000 transaction in which Ed. Goldsmith gave his note for that am't?

Ans. Ed. Goldsmith and Mr. Judah.

172 X Int. 61. What office did Mr. Goldsmith hold in the bank?

Ans. He was cashier of the bank.

X Int. 62. Where was the arrangement made?

Ans. In the bank.

X Int. 63. What memorandum was made in the books of the bank of the notes & bonds, securities for which the certificate was sent to Mrs. Walker?

Ans. It was entered on the deposit book as specially deposited by G. H. Judah, agent for *for* Mrs. Eliza Walker, naming the items, I think.

X Int. 64. At whose request was the certificate made out?

Ans. Mr. Judah's.

X Int. 65. By whose direction mailed to Mrs. Walker?

Ans. I believe I stated before that Mr. Judah addressed & asked us to send it with our mail.

173 X Int. 66. In February, 1882, about the time of the transaction with Mr. Omberg, did you at the Manhattan Bank, in a conversation with Mr. Ernest Walker, say, I know the fix you are in, meaning Walker, Sons & Co., & I would advise you take a lot of your papers to New York & raise money on them?

Ans. I may have said that, meaning that they needed money; I don't remember any conversation to that effect with Mr. Walker.

X Int. 67. Who was the person that managed the business of Walker, Sons & Co.?

Ans. G. H. Judah.

X Int. 68. Who composed the firm?

Ans. E. L. & L. B. Walker.

X Int. 69. Were they, as compared with Mr. Judah, young men?

Ans. Yes, sir.

X Int. 70. Were they, in fact, with their business under——

174 Ans. I don't know that they were so altogether, but I suppose, being their uncle, of greater experience and age — had pretty much his own way.

X Int. 71. Wasn't it your personal observation that he had his own way in the business?

Ans. After I stopped keeping their books I saw very little of their business, but I should judge that as Mr. Judah transacted most of the business with the bank that he did control whilst I kept the books. E. K. Walker was not there & I opened the books & showed L. B. Walker how to keep them. Judah seemed to control L. B. Walker; he seemed to open the business & conduct it altogether.

X Int. 72. You have stated that for the $6,000 note of Walker, Sons & Co., which was closed in the payment of the Goldsmith note, you held collaterals. Were these collaterals as good or de-

175 sirable as the Goldsmith note?

Ans. I don't think they were; the Goldsmith note was nearly due & the collaterals were not; the collaterals were country paper, which is not as good as city paper.

X Int. 73. How long did those collateral notes have to run to maturity?

Ans. I don't remember, but they matured at different times during that winter.

X Int. 74. Did Judah tell you he had no funds with which to pay the $6,000 note outside of the Goldsmith note and the $1,500 discount you granted him?

Ans. Yes, sir.

Re-examined:

1 Q. How many times was Kramer in Memphis about this matter?

Ans. Twice; the first time about 27 Dec., 1882, & the next
176 time a few days after Walker, Sons & Co.'s failure in Jan'y, 1883.

2 Q. You have stated in answer to X Q. 14 that when Mr. Kramer was in Memphis in Dec., '82, he did not demand of you the items mentioned in the receipt Ex. A to his dep. Did he, on that visit, ask or demand of you to pay Mrs. Walker the value of these securities, or to have them returned in kind, or tell you the bank would be held reponsible by Mrs. Walker for them?

Ans. Not to my recollection.

3 Q. Did he, on that visit, either in the bank office or at the Peabody or anywhere else, tell you if the matter was not fixed up he would be obliged to institute suit against the bank?

Ans. Not on that visit.

4 Q. Did he see Walker, Sons & Co. before he left on that visit?

177 Ans. He saw them before he called on me at the bank, at about 2 or 3 o'cl'k in the afternoon; I again saw him at the the office [of] Walker, Sons & Co. when all the firm were present, & again I saw him that night in the hotel.

5 Q. At any of these interviews did he make any demands against the bank on account of the matter?

Ans. He did not.

6 Q. Did you hesitate in any manner when in telling him what you had done with the security when he first spoke [to] you about them?

Ans. When he showed me the receipt, as already stated, I was surprised, but after looking at it I immediately told him what I had done with them. My surprise about the receipt may have seemed hesitancy to him, but I did not hesitate to tell him just what
178 had been done with the securities.

7 Q. When was it he first made any demand about the securities ag'st the bank?

Ans. When he returned in Jan'y, '83, after the failure of Walker, Sons & Co.

8 Q. How long did you keep books for Walker, Sons & Co.?

Ans. About two or three months.

9 Q. In Feb'y, '82, when Judah withdrew the bonds & People's Ins. Co. stock from the Manhattan Bank, was the firm of Walker, Sons & Co. overchecked in that bank?

Ans. No, I think not; the books will show, however.

Re-X-ex.:

Re-X Int. 1. Did Kramer show you the certificates on his visit to the bank on December 27, 1883?

Ans. Yes, sir.

179 Re-X Int. 2. What was the occasion of your visit to the office of Walker, Sons & Co. when you met Mr. Kramer there?

Ans. I had just returned from St. Louis that day; was very busy at the time Mr. Kramer called, & told him I would call at Mess. Walker, Sons & Co.'s office as soon as I was through with my work.

Re-X Int. 3. Were your visits before that to said office frequent?

Ans. No, not very.

Re-X Int. 4. About how often did you go there?

Ans. Sometimes once in a week, sometimes three or four times a week, & sometimes once a month; it depended on the occasions.

MAURICE MAAS.

Sworn to & subscribed before me this 18 day of August, 1884.

[SEAL.] PAUL F. COSTE,
Notary Public, City of St. Louis, Mo.

180 Endorsed: Filed Sept. 22, 1884. Bell W. Etheridge, cl'k. W. B. Weisiger, D. C.

181 UNITED STATES OF AMERICA,
— *Division of the Western District of Tennessee:*

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1884, at the United States court-house in the city of Memphis, in said district, on, to wit, the 1 day of October, A. D. 1884, in the following cause, to wit:

ELIZA WALKER, Plaintiff,
vs.
MANHATTAN BANK, Defendant. } No. 384.

This cause is hereby continued to the next term of this court, with leave, however, to apply for an order to set aside the order of continuance entered herein.

182 Circuit Court of the United States for the District of West Tennessee. Equity Docket.

ELIZA WALKER *vs.* THE MANHATTAN BANK.

The deposition of ELIZA WALKER, taken at the office of L. & E. Lehman this 1st day of November, 1884, in behalf of the plaintiff. Notice, caption, and all formalities waived, but exceptions reserved as to relevancy and competency.

Int'g. 1. State your full name, age, [and] residence.

Ans. Name, Eliza Walker; age, 58 years, and I reside in the city of Philadelphia.

Int'g. 2. Are you a party in this suit?

Ans. I am the plaintiff in this suit.

183 Int'g. 3. How do you happen to be now in the city of Memphis?

Ans. I came here on the advice of my counsel to give my deposition in this case.

Int'g. 4. In the bill in this cause a certificate of deposit is mentioned for $3,000.00, 2nd-mortgage bonds Memphis & Charleston R. R. Co.; $2,200.00, 2nd-mortgage bonds Miss. Central R. R. Company; $1,100.00, certificate of stock of the People's Insurance Company; note for $5,000.00, by Edward Goldsmith; four notes for $325.00, in the aggregate—said certificates being alleged to have been made by the Manhattan Bank. If you have the original certificate or receipt please produce & file it as part of this deposition.

Ans. I have the original paper and here produce & file it
184 as a part of this deposition, marked Exhibit "A."

Int'g. 4½. State how said certificate first came in your possession. If you say it come to you by mail, state whether it was accompanied by a letter, and if it was so accompanied, produce & file such letter as part of this deposition.

Ans. The certificate of deposit was sent to me by mail and was accompanied by a letter. I regarded the letter as of no consequence and it has been lost or destroyed. I searched thoroughly for the letter about 3 weeks ago, but was not able to find it. I made no effort to preserve it, not considering it of any consequence at the time I received it. I put the certificate in a small pocket-book and tried to get the letter in it also, when my youngest son said to me,

"Don't tear the pocket-book; the letter is of no consequence;
185 you have the certificate, and so long as you have that nobody can get your money. That's as good as if you had the bonds in your safe." In the summer of 1882 I went to Cape May, and when sending some things to the safe deposit the children brought down a lot of old letters and said there was no use keeping old letters in the deposit and burned them. I suppose this letter must have been burned then.

Q. 5. In whose hand was that letter written?

Ans. Mr. Maas.

Q. 6. Do you know Maas' handwriting, & how do you know it?

Ans. Yes, sir; because he was the book-keeper of Walker, *Bros.* & Co., of which my husband was a member, and I have had
186 plenty of his letters written to my husband.

Q. 7. Did he ever write any letters to you except that one accompanying the certificate?

Ans. No, sir.

Q. 8. Were you acquainted with G. H. Judah? If yea, please state whether he had any authority to collect the notes or any of them mentioned in the certificate of deposit, Exhibit "A" hereto, or withdraw the bonds or any of them mentioned in said certificate; state fully & exactly just what powers, if any, said Judah had in respect to the securities mentioned in said certificate.

Ans. I knew G. H. Judah; he had no authority from me or anything to do with my bonds; he never mentioned anything
187 of that sort to me; he knew I would not let him do it; he had no power whatever in respect to the securities mentioned in the certificate.

Q. 9. Was or was not the said Judah your general agent in any manner or to any extent touching said securities?

Ans. No, sir; he never had any agency from me; he bought the bonds for me, and that is all I wanted him to do.

Q. 10. Did or did not said Judah have power to change the investment to securities other than those mentioned in the certificate?

Ans. No, sir; & he never told me anything about it.

Q. 11. Did or not said Judah have power or authority to
188 lend said securities or any of them to Walker, Sons & Co.?

Ans. No authority whatever. He never asked me. He cannot say that.

Q. 12. Were the notes of Goldsmith for $81.25 each, aggregating $325.00, paid? If so, by whom were they collected, and who remitted the money to you?

Ans. They were collected & the money remitted by Walker, Sons & Co. through the bank. It was always sent by Walker, Sons & Co. My son Ernest sometimes sent it, and when he was away it was sent by Lee Walker.

Q. 13. What connection, if any, did Judah have with collecting and remitting that interest?

Ans. He had none at all.

Q. 14. Please examine the exhibits to the deposition
189 of G. H. Judah and state what connection, if any, said Judah had with the same, and what knowledge you had of said Judah having any connection with the items mentioned in said exhibits?

Ans. I thought he had none at all; we never wrote to him, but to Walker, Sons & Co.

Q. 15. By whom were said four letters & 1 telegram written & sent?

Ans. By my daughter Belle.

Q. 16. When & how did you first learn that the $5,000.00 Goldsmith note, or its proceeds, and the bonds or any part thereof mentioned in the certificate had been withdrawn from the Manhattan Bank? State where you then were, what you then learned
190 in regard to the securities mentioned in the certificate, and how you learned these facts.

Ans. I first learned that the securities were not in the bank when Mr. Kramer came back from Memphis to Cincinnati. That was about the last of December, '82, or first of January, 1883. I had not been able to get any remittances of interest, and when my daughter came to Cincinnati where I was with a sick daughter she brought the certificate with her. Mr. Kramer then took the certificate & come to Memphis. When he came back he would not at first tell me that my securities were gone, fearing that it would make me sick, but a while after his return I learned from him that they were gone. That was the first I heard of it, and at first I would
191 not believe it. "How can that be?" I said, when I had the receipt.

Q. 17. Were you informed by G. H. Judah, or any other person, that Goldsmith would not renew the $5,000.00 note at maturity?

Ans. No, sir; I never knew anything about it.

Q. 18. Did you or not, at any time before Kramer returned from Memphis to Cincinnati, know that you did not still hold the Goldsmith note for $5,000.00?

Ans. No, sir.

Q. 19. What became of the $1,100.00 of stock in the People's Insurance Company?

Ans. Mr. Maas gave it to Mr. Kramer, & he sold it for me to live on; we hadn't a cent. Kramer got it when he was in Mem-
192 phis, as stated in a preceding answer.

Q. 20. When did you last see Judah prior to the commencement of this suit.

Ans. My husband died on the 28- of July, 1880, in Philadelphia; Mr. Judah was there with his wife, and remained for a few weeks. I have never seen him since that time.

Q. 21. Did G. H. Judah, in his own name, ever make you any remittance of interest accruing on all or any of the securities mentioned in Exhibit "A?"

Ans. Not that I know of.

Q. 22. Did you or not at any time or in any manner authorize Judah to make any disposition of the Goldsmith note or its
193 proceeds, or to collect that note, and make such disposition of the money as he saw proper?

Ans. No, sir; he never asked me or made any proposition at all. He kept it mighty quiet.

Q. 23. After Feb'y 21st, 1882, did you receive any interest on the $3,000, and $2,200 of bonds, or the coupons from those bonds? Please produce any memoranda in your possession that will refresh your memory on this question.

Ans. I last got coupons from the bonds in July & August, 1882. I was then in Cape May, and I think the coupons were taken from the mail by my son. The coupons were deposited by my son in the Fidelity Company, and I produce & file the deposit checks, marked Exhibit- "B" & "C."

194 Q. 24. Did you or not at any time or in any manner authorize G. H. Judah to pledge or raise money on the bonds mentioned in said certificate, Exhibit "A" hereto?

Ans. No, sir; I never did.

Q. 25. Please examine the letters here shown you. State in whose hand each of said letters is written, & whether or not you received the same in due course of mail after the date thereof. File the same as exhibits to this deposition.

Ans. I have examined said letters, nine in number, and file the same as exhibits to this deposition, marked "D," "E," "F," "G," "H," "I," "J," "K," "L," in the order of their dates. Exhibit "D" is in the handwriting of Lee Walker. "E" is in the handwriting of my son, Ernest Walker, and so they are the next six in the order of dates, and the last in order of date by G. H. Judah.

195 Q. 26. Explain, if you can, how the first of said letters happens to be addressed to Ernest Walker.

Ans. My son Ernest was at home in Philadelphia at the time, and

the letter was written to him to be given to me. The interest sent by the letter was my interest.

Q. 27. Attached to the letter Exhibit "D" is a cancelled check for $10,000.00. Please file said check as an exhibit hereto. State whose check it is and to whose order it is payable.

Ans. It is my own check, and it is payable to the order of my son, Ernest Walker. I file the same as Exhibit "M" hereto.

Q. Was the said check sent by way of loan? If yea, to whom did you understand you were making the loan, and state all the facts in regard thereto.

Ans. I was asked by Mr. Judah to send $10,000.00 of my insurance money—insurance on my husband's life—and I would not send it to him, as I was afraid. So I sent the money—the check—to my son at Pine Bluff. Mr. Judah asked me to send the money for the boys to commence business, because they could not commence without some of my money, and that they would return it to me right away.

Q. 29. Was that money, or any part of it, ever repaid to you?

Ans. No, sir; never.

Q. 30. Please look at the letter Exhibit "R," written by Judah, and dated Aug. 31, 1882, and say, if you can, where you were when that letter was received.

Ans. I was at Cape May, on the coast, about 3 hours by rail from Philadelphia. I believe that was the last interest I received from the Manhattan Bank.

196 Q. 31. After reading that letter, your answer to — interrogatory is read over to you, and you will please state whether you wish to modify that answer.

Ans. Yes, I do; I was not at home when that letter was received. The letter was received and opened by my son Ernest, and the check enclosed in the letter was deposited by him to my credit.

X Q. 1. In what way is G. H. Judah related to you?

Ans. He married my husband's sister.

X Q. 2. How long were Judah and your husband in business together?

Ans. From the end of the late war until the firm of Walker Bros. & Co. quit business in Memphis, which was in 1879. Judah and my husband were both members of the firm.

X Q. 4. Did not Walker Bros. & Co. make an assignment for the benefit of their creditors in 1879?

Ans. Yes, sir.

X Q. 5. When were you in Memphis last before this visit?

Ans. In 1875.

X Q. 5. Did you ever have the $5,000.00 which Judah loaned to Goldsmith and for which the Goldsmith notes mentioned in Exhibit "A" to your deposition were given in your possession?

Ans. Never.

X Q. 6. Where did Mr. Judah get that $5,000.00 from then?

Ans. The books of Walker Bros. & Co. were bought from the assignee for my benefit to pay my personal debt they owed me—Messrs. Maas and Goldsmith bought them in for my benefit, and my husband paid for it. Mr. Judah was here and had all the business

in his hands, and collected it from the book accounts mentioned above.

197 X Q. 7. Did you ever have in your possession the money with which the Memphis & Charleston R. R. and Mississippi Central R. R. bonds and People's Insurance Company stock mentioned in said Ex. "A," were bought?

Ans. No, sir.

X Q. 8. Who bought the bonds?

Ans. Mr. Judah.

X Q. 9. Where did he get the money with which he bought them?

Ans. From the same source he got the $5,000.00 mentioned in answer to question 6 cross?

X Q. 10. Did Judah consult with you about lending the money to Goldsmith before the loan was made?

Ans. He never consulted me.

X Q. 11. Did he consult with you about the purchase of the railroad bonds and People's Insurance Company stock mentioned in Exhibit "A" before the purchase was made?

Ans. No, sir; he did not.

X Q. 12. Do you know when these bonds were bought?

Ans. I know they were bought before the date of that receipt or certificate, but cannot remember how long before I knew they had been purchased; wrote for the bonds and the certificate was sent in place of the bonds.

X Q. 13. To whom did you write for the bonds?

Ans. To Mr. Judah.

X Q. 14. Did he reply to your letter?

Ans. Mr. Judah wrote me that it was safer to deposit the bonds in this bank than to send them to me, and then I got this receipt from Mr. Maas.

198 X Q. 15. You say, in answer to X Q. 6 above, that when the books of Walker Bros. & Co. were bought in by Mr. Maas and Goldsmith your husband paid for it. To whom did he send the money to pay for it?

Ans. I cannot tell who he sent it to—he paid for it.

X Q. 16. Did Messrs. Mass and Goldsmith know these books were being bought for your benefit?

Ans. I do not know that they did.

X Q. 17. Did you ever write to the Manhattan Bank or any of its officers or communicate with them in any way about this certificate, Exhibit "A," after receiving it?

Ans. My daughter answered Mr. Maas' letter, enclosing the receipt and thanked him for it. I never wrote or communicated any further with them about it.

X Q. 18. Did not Mr. Judah have entire control over the fund which was realized from the book accounts of Walker Bros. & Co., which you say above were bought in for your benefit?

Ans. Yes, sir; for investment.

X Q. 19. Was any one else interested in these book accounts of Walker Brothers besides yourself?

Ans. I do not know; cannot tell.

X Q. 20. After getting the receipt, Exhibit "A" to your deposition, did you ever write to any one to find out when the Goldsmith note fell due?

Ans. I never did.

X Q. 21. Why did you not do so?

Ans. Because I thought that it was bank stock, and Mr. Judah wrote me that it was all right; to be easy about it.

X Q. 22. Did you then not have perfect confidence in Mr. Judah?

199 Ans. I had no confidence in him.

X Q. 23. If you had no confidence in him why did you rely on his statement that the matter was all right?

Ans. Because I had the bonds in the Manhattan Bank and I thought they would take good care of them and had the receipt at home for it.

X Q. 24. When did you lose confidence in Mr. Judah, if you ever had any in him?

Ans. I never had any in him.

X Q. 25. Did you ever give any one an order on the Manhattan Bank for the $81.25 interest notes of Goldsmith, or for the coupons on the bonds?

Ans. I never gave any order—I never in any way told the bank to give them over to any one.

X Q. 26. You have said in your 4th answer-in-chief that your son told you that so long as you had the certificate, Exhibit "A," no one could get the money. Now, how did you expect any one to get the interest and notes of Goldsmith and the coupons on the bonds from the bank for you?

Ans. My son was here and I thought he could get them for me. I thought any one could get the coupons for me.

X Q. 27. Did you intend then for the bank to turn over the interest notes and coupons to your son for you without any order from you?

Ans. I did not know that he needed any order, for the bank knew me and knew my son.

X Q. 28. Did you not give Judah an order, or orders, to collect some of the dividends on the People's Insurance Company stock?

Ans. I never did.

200 X Q. 29. Did not Judah collect some of the dividends on the stock for you?

Ans. I can't tell who did it.

X Q. 30. In answer to Q. 9 in chief you say that the notes of Goldsmith for the $81.25 each were collected and sent you by Walker, Sons & Co., and sometimes your son, Ernest Walker, sent it to you, and when he was away it was sent by Lee Walker, and in your 13th answer-in-chief you say Judah had no connection with collecting and remitting that interest. Now, was or was not Mr. Judah a member of the firm of Walker, Sons & Co.?

Ans. No; he was only an assistant.

X Q. 31. How much money did you ever loan to Walker, Sons & Co.?

Ans. Twelve thousand dollars; I gave it to my son.

X Q. 32. Did you treat it as a loan to your son or to the firm of Walker, Sons & Co.?

Ans. I loaned it to my son.

X Q. 33. Did you ever loan the firm anything?

Ans. No, sir.

X Q. 34. Are you positive that Judah was not in Philadelphia in the summer of 1881?

Ans. He might have been in Philadelphia that summer, but if he was he did not come near me. I am positive I never saw him after the time he was in Philadelphia when my husband died.

X Q. 35. When Walker, Sons & Co. closed sending you interest in the fall of 1882, how did it happen that you did not write to the Manhattan Bank for the interest on the Goldsmith notes and the coupons on the bonds?

201 Ans. Because they told me they were collecting this interest and sending it all together with the interest on that I loaned my son.

X Q. 36. Did your son Ernest never tell you that the Goldsmith note was paid and that Walker, Sons & Co. had got the money?

Ans. No, sir; never.

X Q. 37. Who did you expect to collect the Goldsmith note when it fell due?

Ans. I did not know anything about that. I was never informed of anything of the kind.

X Q. 38. Did you ever write to Mr. Goldsmith about it?

Ans. No, sir.

X Q. 39. You say, in answer to 28 question-in-chief, that the $10,000.00 mentioned in that answer was to be returned right away; did you demand the return of that $10,000.00 *dollars?*

Ans. Yes, sir.

202 X Q. 40. When and where did you make this demand?

Ans. I made it a few months after, but did not get it. I made the demand on Walker, Sons & Co.

X Q. 41. Who deposited the coupons mentioned in Exhibits "B" and "C" to your deposition in the Fidelity Insurance, Trust and Safe Deposit Company for you?

Ans. My son, Ernest Walker.

X Q. 42. Where are these coupons now?

Ans. They were collected and the money put to my credit in that bank.

X Q. 43. Did your son ever inform you that your bonds had been pledged to the Bank of Commerce to borrow money for the business of Walker, Sons & Co.?

Ans. No, sir.

X Q. 44. In Oct., 1880, when you sent the $10,000.00 out
203 to your son Ernest, did you require any security for it?

Ans. I did not ask for any, because I wanted it back.

X Q. 45. Did you have any interest of any kind in the firm of Walker, Sons & Co.?

Ans. No, sir; not the least.

X Q. 46. Did you require any security for the other $2,000.00 you let your son Ernest have over and above the $10,000.00?

Ans. I did not ask for any. I gave the $2,000.00 to Ernest before the firm of Walker, Sons & Co. was formed at all.

X Q. 47. Then you never loaned Ernest or the firm any money after the $10,000.00 in Oct., 1880, referred to above?

Ans. No, sir; I never.

X Q. 48. Were you not a party to the suit of Raphael Boshman *vs.* Ely Walker *et al.*, in the district court of the U. S. for the eastern district of Ark. at Helena, Ark.?

Ans. I was.

204 X Q 49. Do you remember filing your answer and cross-bill and giving your deposition in that case?

Ans. I remember going to the notary at the time and giving my deposition in that case. I only remember going before him once.

X Q. 50. Can you say that you did or not file your sworn answer and cross-bill in that case?

Ans. I suppose I did—the answer will show.

X Q. 51. Did you or not state in that answer and cross-bill that you had loaned the firm of Walker, Sons & Co. twenty thousand dollars of your own money?

Ans. The answer & cross-bill will show for itself on this point. Before answering this question what purports to be a certified copy of my answer & cross-bill in that case was shown me, but

205 not remembering now, independant of the record in that case, just what I said, I prefer to let the originals of my answer & cross-bill, or accurate or properly certified copy, speak for itself as to its contents.

X Q. 52. Did you not in that answer & cross-bill state that G. H. Judah was a silent partner in said firm of Walker, Sons & Co.?

Ans. I make the same answer to this question as I did to the preceding one, the 51- X question.

X Q. 53. Did you not in that answer and cross-bill make this statement: "That you loaned the firm of Walker, Sons & Co. $20,000.00, for which you were to receive interest at the rate of — per cent; that having confidence in the honesty of said parties you required no security, and more especially relying on the honesty of said Judah, who was a silent member of said firm," etc.?

206 Ans. I make the same answer to this as to the X Q. 51 above.

X Q. 54. Did you not state in said answer & cross-bill that in Jan'y, 1883, as the time the said Walker, Sons & Co. found themselves to be insolvent, Ernest Walker, one of the firm, for the purpose of securing to you the large sum of money due you, assigned & delivered said notes (meaning these notes in controversy in the said Bochman suit), for & on behalf of said Walker, Sons & Co., to you?

Ans. I make the same answer as to the X Q. 51.

X Q. 55. In your deposition in said cause of Bochman *vs.* Elias Walker, at Helena, did you not state in your 5th Ans.-in-chief, "That these notes (referring to the notes in controversy in said suit)

207 were given to you to secure the payment of two notes, debts

due you by Walker, Sons & Co.; and at the time they were given you $19,764.29 *cents* was due you by said Walker, Sons & Co., and that amount was still due you, and nothing had been paid on account *on account* thereof since then?

Ans. I make the same answer as to the X Q. 51, and let the deposition speak for itself.

X Q. 56. Did you not in that deposition state that on Oct. 13, 1880, you advanced to Walker, Sons & Co. $10,000.00; Jan'y 14th, 1881, $4,791.75; Febr'y 28th, 1881, $2,000.00, & on June 6th, 1881, $2,972.54, for which they gave you three notes, copies of which you filed with said deposition, and that at the time you received said notes, copies of which you filed with said deposition, you thought the financial condition of Walker, Sons & Co. was good?

208 Ans. I make the same answer as to X Q. 51, and let the deposition speak for itself.

X Q. 57. Did you not file copies of the notes you held against Walker, Sons & Co. with said deposition?

Ans. I answer just as I did to X Q. 51; the deposition will show for itself.

X Q. 58. Please look at the paper here shown you, and state if it is not your order on the People's Insurance Co., dated Jan'y 8th, '81, directing it to pay $55.00 dividends to G. H. Judah, ag't, and make the same Exhibit "M."

Ans. That is my signature, and I make it Exhibit "M" to my deposition. I had no recollection that I did it, but that is my signature. It looks like my signature.

X Q. 59. Did you have any other stock in the People's Ins. Co. besides the $1,100.00 mentioned in the receipt Exhibit "A" to your deposition?

209 X Q. 60. Look at the original letters & telegram which are exhibits to Judah's deposition, & state in whose handwriting they are, and if not in your own handwriting, then state whether they were written by authority from you or not?

Ans. My daughter, Miss Belle Walker, wrote all the letters. Those dated Jan. 17, '81, & April 22, '81, were written by my authority. The one of Nov. 13, '82, was written while I was in Cincinnati, & the telegram was also sent while I was in Cincinnati. The letter of Feb. 17, '81, I don't remember having seen until this deposition was commenced.

X Q. 61. Did Miss Belle have authority from you to write and answer letters in your name when you were away from home?

Ans. Yes, sir.

210 Re-examination:

Int. 1. Were you present when the books of Walker Bros. & Co. were sold?

Ans. I was not present.

Int. 2. How did you learn for whose benefit they were sold?

Ans. My husband told me; Mr. Judah also told me.

Int. 3. When did Mr. Judah tell you this?

Ans. When he was in Philadelpha, just after my husband died.

Int. 4. To pay what personal debts were these books bought—for your benefit?

Ans. Owing to me by Walker Bros. & Co. on my United States bonds and mortgage on my house.

Int. 5. How came them to owe you for mortgage on your house?

Ans. I gave a mortgage on my house in Philadelphia, to raise money for the firm; I gave two mortgages, one for $8,000.00 and one for $4,000.00.

211 Int. 6. For what United States bonds did they owe you?

Ans. I had $40,000.00 in United States bonds, which my husband asked me to loan to Walker Bros. & Co., & I did so, and they owed me for these.

Int. 7. How much were you to get out of the books above mentioned on what the firm of Walker Bros. & Co. owed you?

Ans. I was to get $25,000.00 and the amount of the mortgages.

Int. 8. Did you have any information as to who attended to the collection of the debts on these books?

Ans. Yes, sir; I was told by my husband, & Mr. Judah told me also at the time. He told me of paying me what they owed me.

Int. 9. Was there any reason given why Mr. Judah should do this?

212 Ans. Because he was here in Memphis, an old member of the firm, and knew all about the books.

Int. 10. The statement contained in your answer to X Q. 6 of the sale of books and the purchase thereof and the collection of moneys from the books, are these matters answered by you now as coming from your own knowledge or from information given to you by others?

Ans. From what others told me.

Int. 11. Your statement of the payment made by your husband for the books, is that a matter of personal knowledge or of information from others?

Ans. Of information from others.

Int. 12. How did you learn that your husband sent the money to pay for the books?

Ans. My husband told me.

213 Int. 13. Did you ever get any notes signed by Walker, Sons & Co.?

Ans. Yes, sir.

Int. 14. How many?

Ans. Two.

Int. 15. How much money were they for?

Ans. One was for $10,000.00 and the other for $9,000.00 and something—I don't know exactly the amount of it.

Int. 16. Where are those notes?

Ans. They are at home, in Phila.

Int. 17. What were they given for?

Ans. The $10,000.00 note was given for the same money that I sent my son the check for in October, 1880; the other note was given for the $2,000.00 I had loaned my son & for collections from the books which had been put for me with Walker, Sons & Co.

Int. 18. Please examine the paper now shown you and state if you know who wrote it, to whom it is addressed, and marked
214 "Exhibit U." Make it a part of this your deposition.

Ans. The paper is in the handwriting of Mr. G. H. Judah, and is addressed to my daughter. I have it marked Exhibit "U," and make it a part of my deposition.

Int. 19. There is mentioned in said paper $4,791.75, which the writing thereof says he has on hand for — woman; to whom does this refer?

Ans. To myself.

Int. 20. The $4,791.75 mentioned in that letter, where did you understand it to come from?

Ans. I understand that it come from the bank.

Int. 21. In Exhibit E of this deposition is mentioned $4,791.75; is that the same or different money from that referred to in Exhibit U?

Ans. It is the same.

Int. 22. Was or not this $4,791.75 included in the notes of
215 Walker, Sons & Co., of which you say you don't know exactly the amount?

Ans. It was.

Int. 23. Was there included in those notes or either of them any money which came from any of these notes mentioned in the receipt Exhibit "A?"

Ans. There was not.

Int. 24. Was there or not any connection between the consideration of those notes and all or any of the items specified in said Exhibit "A," or of the proceeds of any of those items?

Ans. Not at all.

Int. 25 Please examine the letter now shown you, marked Exhibit O, and make it a part of your deposition, & state who wrote it, to whom it is addressed.

Ans. My son Ernest; it is addresssd to myself. I got it by mail a few days after it bears date.

216 Int. 26. There is named in it $9,764.29; is that the same or a different amount for which one of the notes was given to you by Walker, Sons & Co.?

Ans. My recollection is that it is the same amount.

Int. 27. You say in this deposition that G. H. Judah was not a member of the firm of Walker, Sons & Co.; did you ever have a different idea or impression as to this fact?

Ans. I had a different impression until I saw his deposition in this suit.

Int. 28. It appears that Walker, Sons & Co. gave you their two notes, one for $10,000.00 and the other for over $9,000.00, for the consideration you have named; and in reply to X Q. 33 you say, "No, sir." Please explain this.

Ans. I loaned my son the $10,000.00 and $2,000.00, and it was charged to Walker, Sons & Co., and the other was from the
217 books. I meant that I never loaned anything to them direct. Mr. Judah got the money from the books and put it in the

firm. The other money, which I first gave my son, he charged to Walker, Sons & Co., and that they did not get direct from me.

Re-cross:

1. Q. Where did Judah get the money he bought the People's Ins. Co. stock with for you?

Ans. From the book accounts of Walker Bros. & Co.

2 Q. You speak in your re-examination of being told that you would get $25,000.00 and the amount of the mortgages from said book accounts of Walker Bros. & Co. Who told you this?

Ans. Mr. Judah—my husband.

3 Q. Where was the balance of the money received from said book accounts to go?

218 Ans. I never asked; I only wanted mine.

4 Q. Did your husband or any one else tell you how much money he sent out to pay for the book accounts?

Ans. No, sir.

5 Q. You say in your cross-examination that you have two notes against Walker, Sons & Co., one for $10,000.00 and the other for something over $9,000.00. When did you get these notes from Walker, Sons & Co.?

Ans. It was in 1882; in May or June, 1882. I think my son was in Philadelphia and gave them to me—I think the notes are on printed blanks.

6 Q. Have you had these notes in your possession ever since?

Ans. Yes, sir.

7 Q. You say that all of those notes over and above $12,000.00 was for money collected by Judah from the book accounts

219 of Walker Bros. & Co., and placed with Walker, Sons & Co. for you. How do you know this—I mean how do you know that the amount over $12,000.00 was collections from said book accounts?

Ans. My son and Mr. Judah and Leon Walker so wrote me.

8 Q. In answer to the 18 Q., on re-examination, you produce and file a letter of Mr. Judah's which you make Exhibit "N" to your deposition, and in answer to the 25 Q., on re-examination, you produce a letter from your son and make it Exhibit "O" to your deposition. How long have you had these letters?

Ans. Ever since, or shortly after, the date of said letters.

9 Q. Did you ever make any objection to Judah's putting your money with Walker, Sons & Co.?

220 Ans. Mr. Judah never asked me. I wrote to Walker, Sons & Co. for it, but could not get [it].

10 Q. Did you ever write to Mr. Judah and tell him he had no right to let Walker, Sons & Co. have the money?

Ans. I never wrote to him any.

11 Q. Have you any other letters from your son, or Walker, Sons & Co., or Lee Walker, or Judah, about this matter?

Ans. These are all I can find now; I never thought to keep all the letters.

12 Q. Was your husband in Memphis after the assignment of Walker, Bros. & Co.?

Ans. No, sir.

13 Q. Was any other member of that firm here except Judah after the said assignment?

Ans. No, sir.

14 Q. Did not Mrs. Sarah Walker, the wife of Benjamin Walker, get part of the proceeds of the book accounts of Walker Bros. & Co.?

221 Ans. I don't know.

15 Q. Did Walker Bros. & Co. ever give you any notes or written obligations for the money you say you loaned them?

Ans. No, sir, except that they gave me a paper saying they would pay me the mortgage money, but they gave me writings for the bonds.

16 Q. Where is that paper about the mortgage money?

Ans. I have it here. I will leave it with Mr. Lehman.

17 Q. What did you understand the expression in Exhibit "O," that Gale will have a settlement next week with Maas and I will send you your share of collections, to mean?

Ans. I understood it to refer to the book accounts, but I never got it.

18 Q. Did you ever file or make any claim with the assignee of Walker Bros. & Co. for the money you say you let them have?

222 Ans. No, sir.

And further this deponent saith not.

ELIZA WALKER.

Sworn to and subscribed before me this Nov'r 5, 1884.

[SEAL.] J. M. COLEMAN,
Notary Public.

(Endorsed:) Equity, 384. Circuit court of the United States for West Tennessee. Eliza Walker *vs.* Manhattan Bank. Deposition of Eliza Walker. Filed Feb. 19th, 1885. Bell W. Etheridge, cl'k. W. B. Weisiger, D. C.

223 *Exhibit "A" to Mrs. Walker's Deposition.*

ELIZA WALKER *vs.* MANHATTAN BANK.

Number.	When left.	Owner.	Said to contain.	Valued at.	Remarks.
57	1880. Nov. 11	G. H. Judah, ag't for Mrs. Eliza Walker.	As listed on package.	...	(Signed) Returned. G. H. Judah, ag't.

Endorsed: No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *v.* Manhattan Bank. Ex. A to. Walker's depo. Filed Feb. 19, 1885. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

224 *The Fidelity Insurance, Trust, and Safe Deposit Company.*

PHILADELPHIA, *July* 18, 1882.

Deposit of Eliza Walker.

	Dollars.	Cents.
Notes		
Coin		
Checks as follows:		
3 M. & Chas. R. R. Coupons, $35.00 each	105	00

Endorsed: No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *v.* Manhattan Bank. Exhibit B to Walker's deposition. Filed Feb'y 19th, 1885. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

225 *The Fidelity Insurance, Trust, and Safe Deposit Company.*

PHILADELPHIA, *Aug.* 16, 1882.

Deposit of Mrs. Eliza Walker.

		Dollars.	Cents.
Miss. Central R. R. coupons:			
No. 373	40 00		
1538	20 00		
1782	20 00		
2610	4 00		
3229	4 00		
		88	00

Endorsed: No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *v.* Manhattan Bank. Exhibit C to Walker's deposition. Filed Feb'y 19, 1885. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

226 E. L. Walker. Jacob Leubrie.

Office of Walker & Leubrie, dry goods, clothing, notions, &c., P. O. box 125. No. 19 Main street.

PINE BLUFF, ARK., *Oct.* 16*th*, 1880.

MY DEAR MOTHER: I am just in receipt of your letter with check for $10,000.00, which I have sent to Memphis. The mail comes in at night & leaves in a few minutes. I merely write this to inform

you I have received same, as there is no mail that leaves here until Monday night on account of no wagon leaving here on Sunday. Glad to receive a few lines from Esther. Will write more fully to-morrow.

Your loving son, ERNEST.

Endorsed: No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *v.* Manhattan Bank. Exhibit D to Walker's depo. Filed Feb. 19, 1885. Bell W. Etheridge clerk. W. B. Weisiger, D. C.

227 Office of Walker's Sons & Co., cotton factors and commission merchants. 276 Front street.

MEMPHIS, TENN., *June 7th*, 1881.

DEAR ERNEST: Enclosed find—

N. Y. Exch'ge	$146 80
Interest loan, Jan'y 14, 4 mo's, 4,791.75 @ 7%	111 80
" 3, " 2,000 " "	35 00
	$146 80

Cotton continues to arrive daily; expect our receipts will nearly reach 4,000 bales. I wrote you last week in regard to joining Memphis club. If you want to join do not delay answering, or you cannot get in at the reduced rate; nothing new to write; with kind regards to all.

From yours, &c., &c., LEE B. WALKER.

Endorsed: No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *v.* Manhattan Bank, Exhibit E to Walker's depo. Filed Feb'y 19th, 1885. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

228 Office of Walker's Sons & Co., cotton factors and commission merchants, 276 Front street.

MEMPHIS, TENN., *July 6th*, 1881.

DEAR BELLE OR CLARA: I wrote mother a letter to-day enclosing 3 checks, one for $175.00, one for $44.00, & one for $110.00, on the 4th Nat'l Bank of N. Y., on the Importers' & Traders' Bank of N. Y., & one on the German Nat'l Bank of Memphis, which I trust she received. I write this so that if they are not received you can telegraph to the various banks to stop payment, though mother would lose nothing; all are made payable to her.

The People's Ins. Co. pay but 4% this time, as you will see by the within slip of paper; they may pay 6% next time; cannot tell; it all goes according to the profits. I borrowed $5 from mother, which I enclosed with the $110 draft. Uncle Gabe leaves in the morning for Chicago. His address for 5 days is 85 Washington St., care Judah, Weil & Co. In a few days we will have the rent
229 of the houses collected and forwarded to Jacob. You don't know what warm weather is; you ought to be here. U. Gabe

says Belle is to come down this winter. Everything looks bright so far for the fall. When is ma going to C. May? Love to all.

Your loving bro., ERNEST.

The check for $44.00, on German Bank of Memphis, I could not get N. Y. exchange, because I had no order from mother to collect; still it is as broad as it [is] long. If they gave me the cash I would have to get exchange, & that would cost ¼%. I suppose the Fidelity will charge her a ¼%. All mother needs to do is to deposit them at the Fidelity.

ERNEST.

Endorsed: No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *v.* Manhattan Bank. Exhibit F to depo. of Walker. Filed Feb. 19th, 1885. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

230 Office of Walker's Sons & Co., cotton factors and commission merchants, 276 Front street, second floor.

MEMPHIS, TENN., *Aug. 15th*, 1881.

Mrs. Eliza Walker, Phila.

DEAR MOTHER: Enclosed please find exchange No. 30,379 on Fourth Nat'l Bank of N. York, for $168.45, being the interest on

2,200 Miss. Cent. R. R. bonds @ 4%		88 00
Also Edw. Goldsmith's note		81 25
		$169 25
Lee exchange on coupons	40c.	
" exchange " N. York	40c.	
		80
		$168 45

When I come East again I shall bring your railroad bonds with me, which will save you the express on coupons, as they are payable in N. York. Prospects are fair for cotton, but the corn crop is very poor on account of the drought. Heard from U. Gabe; he is still at Waukesha, but is going to Mt. Cummins, Mich., to the Sulphur Springs. Hoping you are all well,

Your loving son, ERNEST.

231 Endorsed: No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *v.* Manhattan Bank. Exhibit G to Walker's deposition. Filed Feb'y 19, 1885. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

232 Office of Walker's Sons & Co., cotton factors and commission merchants, 276 Front St., second floor.

MEMPHIS, TENN., *Oct. 1st*, 1881.

MY DEAR MOTHER: I sent you to-day exchange on the Bank of New York for $409.98, being the interest on all your loans to date.

The firm cannot afford to pay more than 6% for money, so they objected to pay more to you. I sent you 7% for your loan to me. Your next interest will be due on the whole amount on Jan'y 1st next. We made them payable all at one time, so that know exactly when they are due. Hoping you will *fast* well during your *kipper*, with love to all,

Your son, ERNEST.

Endorsed: No. 380. Circuit court of the United States, western district of Tennessee. Eliza Walker *v.* Manhattan Bank. Exhibit H to depo. of Walker. Filed Feb. 19, 1885. Bell W. Etheridge, cl'k. W. B. Weisiger, D. C.

233 Office of Walker's Sons & Co., cotton factors and commission merchants, 276 Front St., second floor.

MEMPHIS, TENN., *Jan'y 13th*, 1882.

MY DEAR MOTHER: I just returned from the country, and find several letters from you all. I also received a telegram that you had not received a letter from me for 3 weeks. It is very strange. I wrote you not less than a week ago. I cannot see what has caused the detention of the mail. Surely you need not worry about my welfare; I always manage to keep well. I send you a telegram to-day announcing the fact of my good health. Enclosed find check on N. York for interest, $321.46; also interest on your R. R. bonds, $105.00—making in all $426.46. The People's Ins. Co. declared a dividend to-day; will collect same to-morrow and remit to you. I notice in the papers that small-pox is bad in Cincinnati. I hope Ess. & Adam will take care of themselves & Clara. Uncle
234 William arrived here last night to look into his affairs. When he returns he will give you a full account, no doubt.

Give my love to all & to yourself.

Hoping you will not worry about me any more, I remain, as ever,

Your loving son, ERNEST.

Endorsed: No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *v.* Manhattan Bank. Exhibit I to deposition of Walker. Filed Feb. 19, 1885. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

235 Office of Walker's Sons & Co., cotton factors and commission merchants, 276 Front St., second floor.

MEMPHIS, TENN., *Feb'y 11th*, 1882.

Mrs. Eliza Walker:

DEAR MOTHER: Enclosed find exchange on Bank of New York for 81.25, less 25c. for exchange, $81.25—am't due you for interest on $5,000 at Manhattan Bank. We are having beautiful weather here now, just like spring, but with you I see it is still cold. You all keep very quiet; have not received a letter from you or any of the folks for over a week.

Hope you are all well. We have nothing new here. With love to all,

Your son, ERNEST.

Endorsed: No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *v.* Manhattan Bank. Exhibit J to Walker's deposition. Filed Feb'y 19, 1885. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

236 Office of Walker's Sons & Co., cotton factors and commission merchants, 276 Front St., second floor.

MEMPHIS, TENN., *Jan.* 14, 1882.

MY DEAR MOTHER *Dear Mother:* Since writing to you yesterday in regard to my health and check for $426.26, I send you enclosed check from People's Ins. Co. on German Nat'l Bank of this city for $55.00, being 5% dividend on $1,100.00. You can deposit check and get the money on it in Phila. We are all well and hope you are also in good health.

Your son, ERNEST.

Endorsed: No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *vs.* Manhattan Bank. Exhibit K to Walker's depo. Filed Feb. 19th, 1885. Bell W. Etheridge, clerk. W. B. Weisiger. D. C.

237 Office of Walker's Sons & Co., cotton factors and commission merchants, 276 Front street.

MEMPHIS, TENN., *Aug.* 31*st*, 1882.

DEAR ELISA: I learn from Ernest that you all are home again from the seashore; trust it did you all some good. The girls, I see, are still growing (*i. e.*, older) with no prospects ahead. I was in hopes it would be otherwise; cannot see why they cannot find some one that will suit, or are they still so very particular and choicey? I trust they will not have to wait much longer. Ernest ought to try, while he is with you, and make up a suitable match for at least one of them. I expect you will get a letter from Hernsa to-morrow, as she has promised to write you and to Esther. I heard from Belle; she is improving very fast. Enclosed I hand you check for interest due from bonds. I thought Lee had sent it up some time ago
238 until Ernest wrote me you had not received it. Trusting you are all in health and very good weather, fine and full, prospects good, am

Your bro., GABE.

Endorsed: No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *v.* Manhattan Bank. Exhibit L to Walker's deposition. Filed Feb. 19, 1885. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

239 No. 2. PHILADELPHIA, *Oct. 13th*, 1880.

Fidelity Insurance, Trust, and Safe Deposit Co. pay to Ernest L. Walker or order ten thousand dollars.

$10,000.00. ELIZA WALKER.

(Endorsed:) 61. Oct. 21, 1880. Paid Oct. 22, 1880. Fidelity Insurance, Trust, and Safe Deposit Co. pay to the order of Walker, Sons & Co. Ernest L. Walker. Walker, Sons & Co. No. 11767. For collection & credit of the Manhattan Bank of Memphis in account with the Fourth National Bank of N. Y., New York. Edw. Goldsmith, cashier. Pay J. A. Irwin, cashier, for collection, on account Fourth National Bank. A. J. Lane, cashier. J. A. Irwin, cashier. No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *vs.* Manhattan Bank. Ex. "M" to Walker's depo. Filed Feb. 19, 1885. Bell W. Etheridge, cl'k. W. B. Weisiger, D. C.

240 MEMPHIS, *Jan'y* 10, '81.

DEAR BELLE: Your favor of 12th to hand. You say you rec'd mine of 9th ultimo containing ch'k. I am at a loss to know what letter you refer to of a month ago. Please explain. I have on hand for mama $4,791.75, which I have loaned to Walker's Sons & Co., with interest, till such time as I can find some safe paying instalment. At present I can get nothing that will suit, but towards spring I expect to find something safe. With love to all, your uncle,

GABE.

Endorsed: No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *v.* Manhattan Bank. Exhibit N to deposition of Eliza Walker. Filed Feb. 19, 1885. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

241 Office of Walker's Sons & Co., cotton factors and commission merchants, 276 Front street.

MEMPHIS, TENN, *M'ch 2d*, 1882.

MY DEAR MOTHER: Yours received; also sister Bella. Your letter was not sent to me in the country; same was returned to me here. Enclosed find check on Importers' & Traders' Nat'l Bank for $79.65, being 35c. for exchange from N. Y., as the bonds are payable there, which caused the delay in sending promptly. U. Gabe will have a settlement next week with Maas, and will send you your share of collections. In regard to the $9,764.29, it will be impossible for us to spare the money at this season of the year, as we have used the money and did not expect you *will* call for it. The season has been a very poor one, and no doubt you read accounts of the overflow, which also tends to damage trade considerable. The Government has sent a boat-load of rations for the sufferers, which
242 has not arrived yet. We have had nothing but rain for a long time until yesterday, when it began to clear up. I hope it will continue, so that the river will fall again, but they suffer as far north as Cincinnati. I wrote to Clara about a week ago, but

have received no answer. Aunt Theresa I do not ask any more why she does not write.

With love to all & lots for yourself.

Your son, ERNEST.

Endorsed: No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *vs.* Manhattan Bank. Ex. O to depo. of Walker. Filed Feb. 19th, 1885. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

243 Circuit Court of the United States for the District of West Tennessee.

ELIZA WALKER
v.
THE MANHATTAN BANK. } No. 384. Equity Docket.

The deposition of Belle Walker, taken in behalf of the plaintiff at the office of L. & E. Lehman this 3d day of November, 1884.

Notice, caption, and all formalities waived, but exceptions reserved as to relevancy and competency.

Int'g 1. What is your age and place of residence?

Ans. Age, 27 years, and reside in the city of Philadelphia.

Q. 2. What is your relation to the plaintiff?

Ans. I am her daughter.

244 Q. 3. Do you make your home with your mother in Philadelphia, and how long have you done so?

Ans. I do, and have done so during my whole life.

Q. 4. Were you with your mother in Philadelphia when she received the certificate of deposit filed as Exhibit "A" to the deposition of the plaintiff?

Ans. I was.

Q. 5. State, if you can, whether that certificate was inclosed with, and accompanied by a letter? If you say it was, state who wrote the letter, and state whether the letter and certificate were in the same handwriting.

Ans. The certificate was enclosed in a letter from Mr. Maas, and both the certificate and the letter were in the handwriting of Mr. Maas.

245 Q. 6. Can you say whether or not at any time during the summer or fall of 1881 G. H. Judah was in Philadelphia, or whether he saw your mother during that fall or summer?

Ans. I know that he was not in Philadelphia during that time, and that he did not see my mother during that year nor since that time.

Q. 7. Please examine the four letters filed as exhibits to the depositions of Judah in this case, and state in whose hands they are written?

Ans. I have examined said letters. I wrote them.

Q. 8. Did you show any or all of said letters to your mother before mailing them?

Ans. The letters of Jan'y 17, '81, and Ap'l 22, '81, I showed
246 my mother before mailing. The letter of Feb'y 7th, '81, I wrote and mailed without showing to my mother. That of Nov. 13, '82, mother was — Cincinnati, and I wrote it without her knowledge; and so also as to the telegrams.

Q. 9. Did you send the telegram exhibited with the deposition of Judah and signed "Belle?"

Ans. I did.

Q. 10. Have you seen the original certificate filed as Exhibit "A" to the plaintiff's deposition?

Ans. I have seen it during the taking of this deposition, and had seen it before.

Q. 11. In whose handwriting is that certificate?

Ans. It is in the handwriting of Mr. Maas—body & signature.

247 Q. 12. Did you, at the date of either of said letters exhibited with Judah's deposition, or at the date of said telegram, know that the securities mentioned in the certificate Exhibit "A" to your mother'- deposition, or any part of the same, or the proceeds of the same, or any part thereof, had been appropriated to the use of Walker, Sons & Co.?

Ans. I did not.

Q. 12½. Had you, at any of the dates above referred to, heard from any source that they had been so appropriated?

Ans. No, sir; I had never heard it.

Q. 13. When and how did you first hear that the $5,000.00 Goldsmith note had been paid, and the money loaned to Walker, Sons & Co., or that that note, or its proceeds, had been used to pay
248 an indebtedness of Walker, Sons & Co. to the Manhattan Bank?

Ans. In January, 1883, when Mr. Kramer returned from Memphis, I was in Cincinnati with my mother & sister, and then for the first time heard from him, or through him, that the securities had been used.

Q. 14. When and how did you first hear that the $5,200.00 of bonds mentioned in the certificate had been pledged to the Bank of Commerce to secure a loan of money to Walker, Sons & Co.?

Ans. In the same manner and at the same time as stated in my last answer.

Q. 15. At the time the letters exhibited with your mother's deposition and marked from "D" to "L," inclusive, & "M²" and "C," were received were you at home with your mother in Philadelphia?

249 Ans. I was at home at the time of the receipt of all of said letters, except those marked "G" & "H" & "L."

Q. 16. Did you read said letters at the time they were received?

Ans. Yes, sir, with the same exception.

Q. 17. Please state when you first saw the letters marked "G," "H," & "L."

Ans. I saw them first a short time ago in Philadelphia, when we

made a search for such letters as we could find, in order to bring them here with us.

Q. 18. Please state whether or not you understood any of said letters as showing or meaning that the securities, or any of
250 them, or the proceeds thereof, or any part thereof, mentioned in said certificate had been used by Walker, Sons & Co. or by Judah for that firm?

Ans. I never understood anything of that sort.

Q. 19. You have stated that Judah was not in Philadelphia in the fall or summer of 1881, and has not seen your mother since that time; state how you know the fact so stated.

Ans. I would know from letters that I would receive from home, and there was no reason for keeping it a secret, and I would know from my brothers & sisters at home at the time. Since that time—that is, since the fall & summer of '81, I have been with my mother, except during part of July, August, September, & part of October, 1882, and I know I have not seen him.

251 1 X Q. When you were with your mother, did you, as a general thing, write her letters for her?

Ans. Yes, sir; but I did not always submit them to her.

2 X Q. And when your mother was away, did you attend to her correspondence for her by opening her letters & answering them for her?

Ans. I did.

3 X Q. Were you with your mother in Cincinnati in the fall of '82 and Jan'y, '83.

Ans. Yes, sir; I got there about 23 Dec., '82.

4 X Q. Did your mother remain in Philadelphia during the entire spring, summer, and fall of 1881?

Ans. Yes, sir.

252 5 X Q. When Mr. Kramer came back from Memphis in Dec., '82, or Jan'y, '83, upon the occasion of either one or the other of his visits to Memphis, did he not bring back a check of Walker, Sons & Co. for 1,000.00, or about that amount, for your mother?

Ans. Yes, sir.

6 X Q. You have stated, in answer to the 18 question, that you never understood the letters Ex. D to L & N & O to Mr. Walker's—as meaning that the statements, or any of them, or the proceeds thereof, or any part thereof mentioned in said certificate Ex. A to your mother's deposition had been *and* by Walker, Sons & Co., or by Judah, for that firm. Now, did you not understand them as showing that Walker, Sons & Co. or Judah were collecting the interest on said securities for your mother?

253 Ans. I understood they were collected by Ernest Walker, as a member of the firm of Walker, Sons & Co., for my mother. One shows Lee Walker sent the interest, and another shows that Mr. Judah sent it, but Ernest; when both those letters were written, was at Philadelphia.

7 X Q. Do you remember seeing the letter you speak of from Mr. Maas after it was received?

Ans. Yes, sir; I saw it when it was received & some time before it was either lost or destroyed.

8 X Q. Did you ever write any letters or communications to the Manhattan Bank for your mother or its officers about the said certificate?

Ans. Only an acknowledgment of its receipt.

254 Re-examined:

Q. 1. How was the interest on the money due from Walker, Sons & Co. to your mother payable?

Ans. Every three months as to part, and every four months as to part.

And further deponent saith not.

BELLE WALKER.

Sworn & subscribed before me Nov. 5, 1884.

[SEAL.] J. M. COLEMAN,
Notary Public.

Filed Feb. 19, 1885.

BELL W. ETHERIDGE.
W. B. WEISIGER, *D. C.*

255 In the Circuit Court of the United States for the Western District of Tennessee. In Equity.

ELIZA WALKER
vs.
THE MANHATTAN BANK. } No. 384.

The deposition of EDWARD GOLDSMITH, taken on behalf of the complainant in the above-named cause on the 6th day of November, 1884, by consent, subject to exception only for competency and relevancy.

Ques. 1. What is your name, age, residence, & occupation?

Ans. My name is Edward Goldsmith; age, 38 years; residence, Memphis, Tennessee, and am the cash*ier* of the Manhattan Bank, the defendant in this suit.

Ques. 2. How long have you been such cash*ier*?

Ans. Since 1878.

Ques. 3. Were you at any time absent from Memphis since 1878, & where?

256 Ans. I was absent from Memphis between March 24th, 1881, & October 1st, 1883, at New York city.

Ques. 4. Who acted as cash*ier* of def't in you absence?

Ans. Maurice Maas, who was the assistant cash*ier*; he became assistant cashier in February, 1880.

Ques. 5. Has your bank, the defendant, since your connection therewith as cashier, always been a bank of deposit?

Ans. Yes, sir.

Ques. 6. During that period has your bank made a practice of receiving special deposits?

Ans. The bank takes care of packages left by customers only, without compensation.

Ques. 7. Do you mean by this that the bank receives packages for customers of valuables, such as bonds?

Ans. Yes, sir; anything that is contained in envelopes.

Ques. 8. Has the bank engaged in this practice with the knowledge of its officers?

Ans. Yes, sir.

257 Ques. 9. Has the bank received special deposits, as you have above described, with the assent of the directors also?

Ans. I can't say yes or no, because I don't know that they did.

Ques. 10. Did your bank keep a record of special deposits?

Ans. The bank keeps a book in which a record is made of the special deposits or packages by number, which is put in a box, & when it is taken away a receipt is taken therefor on that book. The deposit or package is numbered the same as the entry on the special deposit book.

Ques. 11. How long has your bank kept such a special deposit book?

Ans. Since Feb., 1880, and for several years prior to that time. In Febuary, 1880, we revised our system of keeping a record of special deposits by making an inventory of the packages and numbering them. I have here present the special deposit book of the defendants, which has been in use since February, 1880, and contains entries of special deposits since that time.

Ques. 12. Is that book one of the regular books of the bank?

Ans. It is one of the auxilliary books of the bank, being a

258 regular auxilliary book, of which we have a great number.

Ques. 13. Has it been kept in the place of bussiness of defendant with the other books of the bank?

Ans. Yes, sir.

Ques. 14. Has it been kept where the directors & officers could have access thereto like the other books?

Ans. If they desired; all the books are accessible to them.

Ques. 15. Is there any entry on the special deposit book of the bonds & securities involved in this suit? If so, please furnish a copy thereof, & marked, "Exhibit A;" make it a part of your deposition.

Ans. There is, & I furnish a copy thereof, marked "Exhibit A," &, so marked, attach it to my deposition as a part thereof.

Ques. 16. Were the bonds involved in this suit purchased on order by def't?

Ans. I think they were. They were either so bought by defendant or sold by it.

Ques. 17. When def't bought bonds on order it received compensation therefor?

Ans. Presumably, because the usual practice is to charge a commission. I think a small part of the Miss. Central R. R. bonds were bought privately by Mr. —— outside of the bank.

259 Ques. 18. Were or were not some of the bonds bought in New York by Mr. L. Levy, & kept there until about February, 1882?

Ans. I don't recollect that such is the fact. It may or not be so, but I have no present recollection of it, &, perhaps, never did know of it.

Ques. 19. What was the connection of G. H. Judah with the firm of Walker, Sons & Co.?

Ans. I do not know his exact connection. He appeared to be their manager, signed their checks, & attended to their bussiness. He was either a partner or bussiness manager. I don't recollect that I had any information as to what his connection was with the firm, & my idea was, in 1880 & 1881, before my departure from New York, that he had an interest in the firm.

Ques. 20. Was your idea as to his interest based upon the manner in which he transacted the bussiness & control he appeared to have of the affairs of the firm?

Ans. Yes, sir.

Ques. 21. What interest did you believe him to have in the firm?

Ans. I can't say at this time.

260 Ques. 23. Did you ever, prior to Feb-uary 22nd, 1882, have any information as to the nature of his connection with the firm of Walker, Sons & Co.?

Ans. No, sir.

Ques. 23. If you can, please produce statements from the books of def't of the account of Walker, Sons & Co. with the bank, and of the notes which they gave the bank & the payments they made thereon.

Ans. The paper I now produce, marked "Exhibit B," and made a part of this my deposition, is a statement of Walker, Sons & Co'-. account with the bank as prepared by its book-keeper, & I presume it is correct. This is not a statement of the entire account, but only, as this *this* exhibit shows, from June 24th, 1881.

The paper I now produce, marked "Exhibit B" & made a part of my deposition, prepared also by the book-keeper & believed by me to be correct, is a statement of the notes Walker, Sons & Co. gave the bank & payments made thereon.

Ques. 24. Please examine the paper now shown you, marked "Exhibit C" and marked as part of this your deposition.

[Ans.] ———.

261 Ques. 25. In whose handwriting is it filled up on the face?

Ans. It appears to be the handwriting of Mr. Maas.

Ques. 26. In whose handwriting is it signed?

Ans. It purports to be signed by Walker, Sons & Co. by G. H. Judah, & I believe it to be in his handwriting.

Ques. 27. In whose handwriting are its two credits on the back of this paper?

Ans. They appear to be in the handwriting of Louis Goldsmith, the teller of the bank.

Ques. 28. In whose handwriting are the words & figures on the back of Exhibit C, which read as follows: "600 b'ld'g stock; 1,000 B'k Com."

Ans. Those appear to be in the handwriting of Mr. M. Maas.

Ques. 29. In whose handwriting are the other words & figures on the back of said paper, outside of those already referred to?

Ans. They appear to be in the handwriting of Mr. M. Maas except the endorsement, which is in the handwriting of Mr. Judah.

262 Ques. 30. Was this note given to the bank for advances on loans made to Walker, Sons & Co. on or about the time of its execution or for what they already owed the bank?

Ans. I cannot tell.

Ques. 31. Could this be made to appear by balancing the account of Walker, Sons & Co. as it stood at that time?

Ans. According to "Exhibit B" Walker, Sons & Co. were over checked at the beginning of Dec. 30th, 1881, $3,691.21.

263 In the Circuit Court of the United States for the Western District of Tenn. Equity.

ELIZA WALKER
vs.
THE MANHATTAN BANK. } No. 384.

Direct examination of EDWARD GOLDSMITH continued.

Questions by Judge WALKER:

Q. 1. Please state the value of the second-mortgage coupon bonds of the Memphis and Charleston R. R. Co. and of the Mississippi Central R. R. Co. on the 21st day of February, 1882, and in December, 1882, & please state the highest value of said bonds from the 1st of the proceeding dates down to the 19th day of January, 1883, and also the highest value of said bonds from the first of the dates above given, to wit, February 21, 1882, down to this time.

A. The figures given in reply to above are made up from records of purchases or sales on the books of the Manhattan Bank at about the respective dates, except in the case of the highest price for the Miss. Central 2 do., which is from memory of a transaction while it was in New York, no transaction of so high a price appearing in Memphis.

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	Mem. & Chs. seconds.	Miss. Central 2 do.
Feb. 21, 1882	104	106½.
Dec., 1882	101 & interest	101 & interest.
Highest	104¼ & interest	106½ & interest.

Interest coupons on Mem. [&] Charleston bonds matured semi-annually, in January & July; on Miss. Central bonds, Feb'y and August.

Q. 2. Do you know whether Judah had any money in the firm of Walker, Sons & Co.?

A. I do not, of my own knowledge.

Q. 3. Did you ever hear that he had any money in that firm?

A. I cannot say that I did.

Q. 4. Can you say that you did not?

A. No, sir; I cannot say that.

Q. 5. Was it your belief that he did have money in the firm?

A. I presumed that he did have some money there.

Q. 6. State why you presumed so.

A. Simply from his connection with the firm, & from the fact that he managed their bussiness & signed all checks.

Q. 7. Did he ever tell you that he had money in the firm?

A. No, sir; not that I recollect.

Q. 8. Did he ever give you to understand in any manner, directly or indirectly, that he had any money in the firm?

265 A. I cannot recollect that he did or did not.

Q. 9. Do you know who bought the books of Walker Bros. & Co. at the assignee's sale?

A. I think Mr. Maas did; I know he did; he told me so.

Q. 10. Do you know whether Judah originally had or ever acquired any interest in that purchase?

A. I do not know.

Q. 11. Did you ever understand from Judah how the fact just above enquired about was?

A. No, sir; I never had any conversation with Mr. Judah upon the subject.

Q. 12. Did you ever understand from Mr. Maas how the fact was?

A. I could not say that I did, except that Mr. Maas & Mr. Judah were intimate, & he perhaps did, for all I know.

Q. 13. You left for New York in March, 1881, did you not? Did you know at that time that Maas had purchased the books of Walker Bros. & Co.?

A. Yes, sir.

Q. 4. When did you first know that fact?

A. I heard of it at the time it took place, but I could not say exactly about the date. I know it was in '80—some time in 1880.

266 Q. 15. Preceeding Nov. 27, '80?

A. I think so.

Q. 16. Were the monies collected on the books & assetts of Walker Bros. & Co. that were bought by Maas deposited in the Manhattan Bank?

A. I think they were.

Q. 17. To whose credit?

A. I think they were deposited to the credit of M. Maas, ag'nt; I never had occasion to know for certain.

Q. 18. Did Maas ever tell you what disposition was made of these funds?

A. I cannot recollect that he did.

Q. 19. Did you know or understand from any source what disposition was made of them?

A. I have no positive information on the subject.

Q. 20. Had you no kind of information—positive or otherwise?

A. I simply had an inference that perhaps Mr. Judah or his relatives or his former partners had an *inference* in them, but it was simply an inference, arising from the intimacy of parties.

Cross-examination of EDWARD GOLDSMITH.

Questions by Mr. TURLEY:

267 Q. 1. Who attended to the bank's cor-espondence during the fall of November, '80?

A. Mr. Maas & myself.

Q. 2. Who attended to mailing the letters & seeing them sent off?

A. I did, sir.

Q. 3. Did you look over all cor-espondence before mailing & sending to the post office?

A. Every letter pertaining to the bank's bussiness at the time was read & addressed & stamped by myself, as it was the routine of the bank.

Q. 4. Then, if Mr. Maas wrote a letter for the bank, that letter would, as a general rule, be examined by you before it was sent to the post office?

A. Yes, sir.

Q. 5. Did you ever see the receipt of Nov. 27, 1880, a coppy of which is attached to the deposition of Adam Kramer?

A. I have never yet seen it.

Q. 6. Did Mrs. Walker at any time after 27th November, '80, or at any time, ever make any demand on you for the $5,000.00 note that you gave to Judah as agent?

A. No, sir.

Q. 7. Did you ever hear from her that she held the bank's receipt for said note?

A. No, sir.

268 Q. 8. Did she ever at any time communicate with you or make any demands on you as an officer of the bank or in any way for the stocks & bonds mentioned in said receipt of Nov. 27, '80?

A. I never had any correspondence with Mrs. Walker of any character; never saw her handwriting; have never seen her, to my knowledge.

Q. 9. State now exactly the way in which the $5,000.00 was loaned to you on the 1st of Nov., '80, & for which you gave your note to Judah, payable 12 months fixed after date. How did Judah pay you over the money?

A. Mr. Judah stated to me about that time that he was managing some funds for one of his sisters which he desired to invest. I think he said—I forget the name of the sister—& as I had purchased some stock in the Manhattan Bank shortly before, on which I desired to borrow some funds, he agreed to loan $5,000.00 to me for one year, whereupon I gave him my note for $5,000.00, dated Nov. 1st, payable 12 months fixed after date to his order as agent; also 4 notes, payable quarterly for interest thereon. He then gave me Walker Bros. & Co.'s check for $5,000.00 on the Manhattan Bank, which I deposited to my credit in that bank. Attached to that note

269 as security were 30 shares of my Manhattan Bank stock.

Q. 10. Will you please file copy of said note as an exhibit to your deposition?

A. I will do — & mark it Exhibit D.

Q. 11. When your note matured did you wish to recover it or did you wish to pay it?

A. I was asked whether I wished to recover it some weeks before maturity, but I replied that I desired to pay it, having no further use for the $5,000.00.

Q. 12. How was the note paid?

A. I asked that the note be sent to New York for collection, I having, meanwhile, removed to New York, which was done.

Q. 13. Do you remember of seeing Mr. Adam Kramer here at any time during the winter of '82? If so, state when it was.

A. I was introduced to him in the office of the Manhattan Bank, between Dec. 26 & 30, '82, by Mr. Maas.

Q. 14. Did Mr. Kramer say anything to you at that time about this matter which is now under controversy in this lawsuit?

A. No, sir.

Q. 15. How came you to be in Memphis at that time?

A. I came, as I did before, on a visit of inspection, being still cashier of the bank.

270 Q. 16. How were the interest notes on your $5,000.00 note paid?

A. They were paid at the bank as they matured and charged to my account.

Q. 17. Did you ever buy any books of Walker Bros. & Co. from the assignee of that firm or from any one else?

Q. 18. No, sir; the proposition was made by them, but I declined at the time.

Cross-examined by Judge WALKER:

Q. 1. State, please, what date your $5,000.00 note was paid & to whom.

A. It was paid at maturity to Mr. L. Levy, of New York, at his banking house in New York; maturity was Nov. 1st, '81.

Q. 2. And to whose credit did the proceeds of the note go on the books of L. Levy?

A. To the Manhattan Bank in Memphis.

Q. 3. Do I then correctly understand that the note before being forwarded to New York had been endorsed to the Manhattan Bank & that it came to New York as the property of that bank?

A. It was so endorsed & came th-ough in the regular cou-se to be accounted for to the said bank.

271 Q. 4. I see from the note that it is payable to the order of Judah, agent. Did you know at the time of the making of the note whose agent Judah was in the transaction?

A. I did not know specially at the time.

Q. 5. At what time did you know whose agent he was?

A. Some time in 1881, I think, or shortly after making my note.

Q. 6. Did not Judah tell you whose ag-nt he was?

A. When I borrowed the note I stated that he said he managed the funds for one of his sisters. I knew that he had several sisters, two or more. I do not know which one it was he claimed to be acting for.

Q. 7. You say that when the $5,000.00 loan was made to you by

Judah he gave you the check of Walker, Sons & Co. on the Manhattan Bank?

A. Yes, sir.

Q. 8. Are you quite sure about this, Mr. Goldsmith; have you refreshed your memory about it?

A. Yes, sir; I have a partial recollection and have refreshed my memory by referring to the bank's books & other sources.

Q. 9. In speaking of your suspervision of the bank's correspondence in your cross-examination, did you mean to say that Maas might not have written to the plaintiff in this suit enclosing the receipt of Nov. 27, '80, & have mailed such letter without your
272 knowing the fact that he had done so?

A. I did not mean to say that such a case was impossible, but that it was entirely at variance with the routine of the bank's cor-espondence.

Q. 10. Have you examined the letter-press of the bank to see if a coppy of any such letter was upon it?

A. I have not examined it; I could very readily, of course.

Q. 11. Did you know, at or about 27 Nov., '80, that the receipt, coppy of which is appended to Kramer's deposition, had been sent to the plaintiff?

A. No, sir; I did not know.

Q. 12. When did you first hear or understand that that receipt was in plaintiff's possession?

A. About the time that the suit was filed; in January, '83.

Q. 13. When & where did you first meet Adam Kramer?

A. In the office of the Manhattan Bank, between Dec. 26 & 30, '82.

Q. 14. Did you have any conversation with him in respect to the matters involved in this suit?

A. No, sir.

273 Q. 15. Did Maas have any conversation with him in respect thereto?

A. No, sir; not while I was there. I knew nothing about the matter at all at that time; nothing was said by Cramer or Maas, [so] far as I know.

Q. 16. Did you have any conversation at all with Mr. Cramer at that time?

A. We merely conversed together pleasantly on different subjects for 10 or 15 minuits.

Q. 17. Not upon any matter of bussiness?

A. No, sir; not upon any matter of bussiness.

Questions by Mr. TURLEY:

Q. 1. Will you please look at the letter-press of the bank & see if you find any letter from Maas to Mrs. Walker enclosing the receipt?

A. I will do so, and I find none.

Q. 2. Did Judah keep an account with the bank as guardian—G. H. Judah, guardian?

A. Yes, sir.

(Signed) EDWARD GOLDSMITH.

Sworn*ed* and subscribed before me this 13 Feb'y, 1883.

(Signed) J. M. COLEMAN, *J. P.*

274 *Exhibit "A" to Goldsmith's Deposition.*

Payments.			Discounts.		
No.	When made.	Amount.	No.	Date.	Amount.
1956	Dec. 18, 1880	3,623 66	1956	Nov. 10, 1880	3,623 66
57	" 28, 1880	1,158 33	57	do.	1,158 33
58	Jan. 18, 1881	3,623 79	58	do.	3,623 79
2007	" 31, 1881	1,857	2007	Dec. 22, 1880	1,857
08	" 15, 1881	2,215 79	08	do.	2,215 79
09	" 28, 1881	1,534	09	do.	1,534
2012	Dec. 30, 1880	5,500	2012	Dec. 28, 1880	25,000
	Jan. 3, 1881	15,400			
	Mar. 17, 1881	4,100			
2061	Ap'l 18, 1881	2,215 79	2061	Jan. 17, 1881	2,215 79
2072	Feb. 18, 1881	3,533 15	2072	" 27, 1881	3,533 15
2073	" 28, 1881	2,750 75	73	do.	2,750 75
2084	May 3, 1881	1,857	2084	" 31, 1881	1,857
2136	Ap'l 12, 1881	8,000	2136	Mar. 17, 1881	8,000
2137	Ap'l 21, 1881	8,000	37	do.	8,000
38	Ap'l 18, 1881	8,000	38	do.	8,000
39	May 18, 1881	5,000	39	do.	5,000
40	June 8, 1881	10,447 68	40	do.	10,447 68
2170	May 23, 1881	8,000	2170	Ap'l 19, 1881	8,000
2189	June 8, 1881	5,000	2189	May 17, 1881	5,000
2213	July 5, 1881	20,000	2213	June 8, 1881	20,000
2235	Oct. 5, 1881	4,000	2235	July 5, 1881	4,000
36	Oct. 22, 1881	6,000	36	do.	6,000
37	Dec. 30, 1881	5,000	37	do.	5,000
38	" 30, 1881	5,000	38	do.	5,000
2354	Dec. 13, 1881	1,500	2364	Oct. 22, 1881	1,500
2386	Jan. 30, 1882	600	2386	Nov. 12, 1881	600
2404	Dec. 6, 1881	1,500	2404	Dec. 6, 1881	1,500
2441	Jan. 30, 1882	600	2441	Dec. 30, 1881	13,500
	Feb. 14, 1882	1,000			
	May 1, 1882	11,900			
2496	Ap'l 8, 1882	2,000	2496	Feb. 14, 1882	2,000
2571	May 23, 1883	108 86	2571	May 1, 1882	18,066 60
	June 30, 1882	7,453 15			
	" 30, 1882	2,528 53			
	Oct. 24, 1882	2,345 12			
	Oct. 26, 1882	2,688 20			
	Jan. 4, 1883	100			
	" 12, 1883	78 90			
	M'ch 7, 1883	535 69			
2572	Oct. 13, 1882	657 30	2572	May 1, 1882	5,250
	Jan. 12, 1883	4,592 70			
2573	May 13, 1882	1,500	2573	May 1, 1882	1,500
2606	June 8, 1882	1,250	2606	May 27, 1882	1,250
07	do.	1,250	2607	do.	1,250
08	do.	2,500	08	do.	2,500
2886	Oct. 15, 1883	214 68	2886	Jan. 20, 1883	2,500
			2887	do.	1,076 15
				Balance due:	
			2571	Balance	2,228 15
			2886	"	2,285 32
			2887	"	1,076 15
					$5,589 62

275 LEDGER "D."

In account with the Manhattan Bank, Memphis, Tenn.

Please examine and report upon this account immediately.

June	24.	Balance	116 68	June	28.	C'y	116 68
Nov.	4.	2 checks	1,994 02	Nov.	4.		8,977 50
	5.	6	6,968		7.		863 08
	"	1 int.	4		12.		3,593 60
	7.	1	189 75		16.		1,000
	8.	2	1,440 01	Dec.	30.	Dis.	13,500
	9.	3	1,728 30		"		325 39
	10.	5	796 41	Feb.	14.	do.	1,958 65
	11.	2	200		"	20 sh's Planters' stock	2,090
	"	2	3,023 50	May	1.	C'y	991 62
	12.	3	234 90		"	Dis.	23,316 60
	14.	1	100		29.	"	2,487 50
	15.	2	1,366 25				
	"	1	23 05				
	16.		57 20				
	30.	do.	17 53				
Dec.	30.	1 do.	116 65				
	"	1 check	10,000				
Feb.	14.	1	2,000				
	23.	2	2,048 65				
Ap'l	11.	1	1,248 01				
	12.	2 int.	2,022 25				
	14.	1	1,576 86				
	15.	2	448 30				
	17.	1	50				
	18.	2	2,600				
	22.	3	537 91				
	24.	1	1,354				
	26.	1	100				
	27.	1	208 38				
	28.	2	1,271 59				
	29.	Int. on note	342 77				
	"	3 int.	648 20				
May	1.	1	11,900				
	29.	2	2,331 30				
	31.	1	86 33				
June	2.	1	50				
		Balance	19 87				
			59,220 62				

276

June	7.	1 check	64 56	June	6.	Balance	19 78
	14.	1	35	July	5.	Dis.	100
July	1.	2	773 88	Oct.	16.		865 06
	5.	2	101 25	Oct.	17.		825 00
Aug.	1.	1 int.	6 05		26.		300 00
	31.	1 do.	5 93			Balance	1,572 59
Oct.	2.	1 do.	5 78				
	11.	1 copy of assignment	2 00				
	14.	1	210				
	16.	2	533 41				
	17.	1	85				
	24.	1	464 90				
	27.	1 acc'pt'ns of Silv'm'n	450				
	27.	Farr'n'ton, trip	126 85				
Nov.	1.	Int.	4 31				
	2.	Firem. Ins. Co.	800 00				
	13.	Int.	3 90				
Dec.	1.	"	9 70				
			3,682 52				3,682 52

Dec.	2.	Balance	1,572 59	Dec.	4.	C'y	1,500
	4.	1 check	550		11.		1,500
	"	1	830		18.		1,100
	"	1	120		"		1,873 72
	11.		1,500		19.		1,580 52
	13.		1,100		21.		1,500
	18.		1,873 72		23.		850
	19.	Int.	7 93				
	20.		1,500				
	23.	2	691 25				
	27.	3	158 75				

(Endorsed:) No. 384. Circuit court of the United States, western district of Tenn. Eliza Walker *vs.* Manhattan Bank. Exhibit "B" to Goldsmith's depo. Filed Feb. 19th, 1885. Bell W. Etheridge, cl'k. W. B. Weisiger, D. C.

277 $13,500.00. MEMPHIS, TENN., *December* 30, 1881.

On demand, after date, we promise to pay to the order of ourselves thirteen thousand five hundred dollars, for value received, and all attorneys' fees and other costs and charges properly incurred in the collection of this debt, payable at the Manhattan Bank of Memphis, with interest at six per cent. per annum from date until paid, that rate having already been paid until maturity. As collateral security for the payment of this note, and to secure any other indebtedness that may be in existence at maturity hereof from and to the parties as herein named, we have deposited with said Manhattan Bank: Two notes of J. Greenwald for $1,300 and $1,350, 2,650; three notes of Hect & Sturm for $2,000 each, 6,000; six notes of H. & L. Silverman for $2,512.70, 2,506.30, 2,450, 2,433, 2,322.25, and 2,331, 14,555.25; and agree, in the event of a decline in the market value of said collaterals, to deposit with the same additional collaterals from time to time in such sufficiency that the salable market value of the entire collaterals shall be at least — per centum in excess of this specific debt. A failure to deposit additional collaterals as agreed, or to pay the note at maturity, shall be full and sufficient authority for said bank to sell the aforesaid collaterals at public or private sale without notice, the net proceeds thereof in whole or in part as may be necessary to be applied toward the liquidation of this and other indebtedness herein contemplated; and should the proceeds of said collaterals, in the event of such
278 sale, be insufficient to pay the amount of this debt, together with all proper expenses and costs, we hold ourselves, nevertheless, bound for such deficiency.

WALKER, SONS & CO.,
Per G. H. JUDAH.

(Endorsed:) Rec'd on account of Jan. 30 | 82, six hundred dollars. Louis Goldsmith, teller. Rec'd on account 2 | 14 | 82, one thousand dollars. Louis Goldsmith, teller. Walker, Sons & Co., per G. H. Judah. Manhattan Bank of Memphis. No. 2441. No. 384. Circuit court of the United States, western district of Ten-

nessee. Eliza Walker *v.* Manhattan Bank. Exhibit "C" to Goldsmith's depo. Filed Feb. 19, 1885. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

279 "EXHIBIT D."

(Copy of the note made by me Nov. 1, 1880, and paid at maturity, Nov. 1, 1881. The figures & words in black are printed in the original; those in red are written.) 12 | 20 | 84. Edw. Goldsmith.

[NOTE.—Words and figures in brackets are written in the original.]

$[5,000.] MEMPHIS, TENN., [*Nov. 1st,*] 18[80].

[Twelve months, fixed], after date [I] promise to pay to the order of [S. H. Judah, Esq., ag't, five thousand & $\frac{00}{100}$] dollars, for value received, and all attorneys' fees and other costs and charges incurred in the collection of this debt, payable at the Manhattan Bank of Memphis, with interest at six per cent. per annum after maturity until paid, that rate having already been paid until maturity. As collateral security for the payment of this note, and to secure any other indebtedness that may be in existence at maturity hereof, and to the parties as herein named, have deposited with [said G. H. Judah, ag't, thirty shares, par value six thousand dollars, stock of the Manhattan Bank of Memphis, Tenn., represented by certificate No. 58]; and agree, in the event of a decline in the market value of said collaterals, to deposit with the same additional collaterals, from time to time, in such sufficiency that the saleable market
280 value of the entire collaterals shall be at but — per centum in excess of this specific debt.

A failure to deposit additional collaterals as agreed or to pay this note at maturity shall be full and sufficient authority for [said G. H. Judah] to sell the aforesaid collaterals at public or private sale, with or without notice, the net proceeds thereof, in whole or part, as may be necessary, to be applied towards the liquidation of this and other indebtedness herein contemplated; and should the proceeds of said collaterals, in the event of such sale, be insufficient to pay the amount of this debt, together with all proper expenses and costs, [I] hold [myself] nevertheless bound for such deficiency.

(Endorsements on back of the above.)

[Manhattan Bank of Memphis. No.] 2366.
[G. H. Judah, ag't.]

(Reversed by mistake.)

[Pay L. Levy, or order, for collection, account of the Manhattan Bank, Memphis, Tenn. No. 2366. Edw. Goldsmith, cash.]

[Pay ——, or order, for collection, account of the Manhattan Bank, Memphis, Tenn. No. —. 12 | 29 | 84. Edw. Goldsmith, cash.]

[Paid 11 | 1 | 81, & cr'd Manhattan Bank on books, L. Levy. G.

281 Endorsed: No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *v.* Manhattan Bank. Exhibit "D" to Goldsmith's depo. Filed Feb. 19, 1885. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

282 *Deposition of Adam Kramer. Filed Feb'y* 25, 1884.

UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

Be it remembered that at a regular term of the district court of the United States for the eastern district of Arkansas, begun and holden at the Federal court-room in the city of Helena on the 2d Monday in March, A. D. 1884, the same being the 10- day of said month, there was present and presiding Hon. Henry C. Caldwell, judge of said court; D. B. Russell, marshal of said district, and Samuel J. Clark, clerk of said court, when, among other proceedings had, were the following, on the — day of ——, 1884, a day of said term, viz:

283 In the District Court of the U. S. for the Eastern District of Arkansas.

RAPHAEL BUCHMAN *vs.* ELIZA WALKER *et als.*

It is hereby agreed that the depositions of Adam Kramer may be taken at the law office of Kramer, Long & Kramer, Cincinnati, O, before any notary public, at any time before March next, on the interrogatories & cross-interrogatories hereto annexed & read as evidence on behalf of defendant at the trial of the above cause, further notice being waived, saving and reserving all questions as to competency and relevancy.

BOBO & PALMER & NICHOLLS,
For Pl'ff.

H. A. PACKER &
STEPHENSON & TREIBER,
For Def't.

Interrogatories.

1st. State your name, residence, & occupation.

284 2d. Are you acquainted with the parties to this suit?

3d. Do you know anything in regard to the notes & mortgages in controversy in this action, to whom they belong, and how they came into defendant's possession?

4th. Are you acquainted with Lee B. Walker, late of Memphis, Tenn.? If yea, state fully all conversations & transactions you may have had with him in regard to these notes, & give dates.

5th. Are you acquainted with G. H. Judah, late of Memphis, Tenn.? If yea, state fully what his former occupation was, & give the substance of all conversations and transactions you may have had with him in regard to the matters in controversy.

6th. Do you know anything of the indebtedness claimed to be due from Walker, Sons & Co. to defendant? If yea, state all you know about it.

7th. Did you ever have any conversation with the mem-
285 bers of the firm of Walker, Sons & Co. in regard to the ownership of these notes? If yea, state with whom, when, & give the purport of it.

8th. State anything else you may know that may be of benefit to either party in this cause.

STEPHENSON & TREIBER,
For Def't.

Cross-Interrogatories.

5th, 6th, & 7th interrogatories objected to.

1st. What relation, if any, are [you] to the defendant, Mrs. E. Walker, or are you connected in any way with her?

2d. Are you not one of the counsel in this cause?

3d. In your answer as to conversations with different parties state who was present, when they took place, and the dates thereof.

4th. State in your answers to the foregoing interrogatories which are from your own knowledge and which from hearsay.

286 5th. In your answer to the 7th interrogatory, if you say you had any conversations with any of the members of the firm of Walker, Sons & Co., state who are the members of such firm; with which one or ones of said members you conversed; when the conversations took place and the date thereof.

6th. State fully all that was said in the language of the party and not the purport of it, as asked.

BOBO, PALMER & NICHOLLS,
For Pl'ff.

ADAM A. KRAMER, being by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth in the action pending in the district court of the United States for the eastern district of Arkansas, wherein R. Buchman is plaintiff & E. Walker *et als.* are defendants, in answer to the interrogatories and cross-interrogatories hereto attached, testifies and deposes as
287 follows:

1st. In answer to the first interrogatory said Adam A. Kramer testified as follows: My name is Adam A. Kramer; residence, 357 West Fourth street, Cincinnati, Ohio; occupation, att'y; member of the law firm of Long, Kramer & Kramer, Cincinnati, Ohio.

2d. In answer to the 2d interrogatory he testified: I am acquainted with the parties to this suit.

3rd. In answer to the 3d interrogatory he testifies: I do know in regard to the notes and mortgages in controversy in this action that they belong to Mrs. Eliza Walker and — acquired by her in the following manner: I went to Memphis, Tennessee, for Mrs. Eliza Walker, as her attorney, some time in the early part of 1882, as near as I can now recollect; Mrs. Walker at that time was in this city in attendance upon my wife, who was her daughter, my wife being then very ill and having since died. At the request of Mrs.
288 Walker, I went to Memphis at said time to see the members of the firm of *of* Walker, Sons & Co. in relation to her claim

against the firm, and met Mr. Lee B. Walker and Ernest L. Walker, two of the partners, and asked them to give me for Mrs. Walker payment on account of her claim or security for it. They stated that at that time they could give me certain notes and mortgages which they owned as security on account of Mrs. Walker's claim, and I agreed on behalf of Mrs. Walker to accept them; and thereupon Ernest L. Walker and Lee B. Walker together left me and said they would come back presently and bring me the papers referred to, which within about one-half hour or so they did. These notes were then delivered with the mortgages in controvery in this action to
me as the attorney for Mrs. Walker, and, as near as I now
289 can recollect, were endorsed over to her in blank, by Walker,
Sons & Co., with the agreement that the proceeds were to be applied on account of Mrs. Walker's claim against the firm. I brought all these notes and mortgages with me to Cincinnati on my return, and afterwards delivered them to Mrs. Walker, and at her request subsequently caused them to be transmitted to Mess. Stephenson & Trieber, att'ys, at Helena, Arkansas, for collection on her account.

4th. In answer to the 4th interrogatory he testifies as follows: I am acquainted with Lee B. Walker. I had a number of conversations with him in relation to these notes in controversy. I had applied to him for Mrs. Walker for payment or adjustment of her claims against the firm, he apparently being in charge of the books of the firm. I cannot definitely recollect the time of the first conversation, but believe it was during the last
month of 1882, or thereabouts. He stated that he
290 could not then pay Mrs. Walker, as he had other obligations
to meet, and collections were slow, but he would endeavor to remit her part of account and see that she was amply protected; that the firm had a large amount of outstandings in notes, mortgages, and other assets, which were slow of collection at that season. This occurred at a former visit, shortly before the time when I finally received the notes and mortgages referred to. In the meantime Mr. Walker had neglected sending any money to Mrs. Walker, on which account I made the second trip shortly thereafter. I now recollect more definitely the time. My first visit to Memphis, referred [to], was about Christmas, 1882, and the second visit, at which time I received the notes and mortgages, was in the early part of January, 1883—before the middle of January, I know. At
this second visit I met *I met* Mr. Lee Walker again, and
291 insisted upon some arrangement, as he had not remitted as
promised. He said he had been unable to collect on the outstandings of the firm, as he had hoped. I then, in the presence of Ernest Walker, asked of both of them that they transfer these notes and mortgages to Mrs. Walker, and deliver them to me for her, to which they both consented, and which was accordingly done. Lee Walker had frequently spoken to me about these notes and mortgages, and they were delivered to me, as stated, with his full knowledge and consent at that time, and he subsequently went with me, either the next day or the day afterwards, from Memphis

to Indian Bay, Arkansas, knowing that I had these notes and mortgages in my possession, to see Mess. Silverman, Judah, and others, at that place, as to their collection. He mentioned to me on board the boat once or twice that he had seen Mr. Judah's wife
291*a* after the notes and mortgages had been delivered to me, and that she had complained to him that he had consented to deliver them to me, and thought he had better have kept them, so that Mr. Judah might be better assisted, but he never made any question to me about them himself until after I had sent them to Mess. Stephenson & Treiber for collection. On one occasion I believe he was in this city, and claimed that his mother was *a* also a creditor of Walker, Sons & Co., and if these notes were collected he wanted me to say that an allowance should be made to her. The matter then being out of my hands, I could make no promises, and told him that I feared there would not be near enough to pay Mrs. Eliza Walker- large claim.

5th. In answer to the 5th interrogatory he testified as follows: I am acquainted with G. H. Judah. His former occupation,
291*b* so far as I know, [was] once a member of the firm of Walker Bros. & Co., of Memphis; subsequently a member of the firm of Walker, Sons & Co. I met Mr. Judah at my first visit in Memphis referred to, but he was at home sick, and referred me to Mess. Lee & Ernest Walker. I, however, asked him at that time if he couldn't pay Mrs. Walker anything just then. I thought she ought to have some security for so large a claim. The only security that they could then offer, he said, would be a number of outstandings, consisting of notes and mortgages which the firm had received in their business dealings with Mess. Silverman, of Indian Bay, Arkansas, but that they needed them in their business, from which to collect to pay the firm obligations as they matured. He said he might give me a part of them, but proposed to give me a check for $1,000 on
291*c* account and he could collect the notes more readily than I could. I accepted the check at that time and did not insist upon the securities, but before the check was presented Mr. Lee Walker urged me to withhold it, claiming that they could not spare the money at that time, and the check was not paid. On my second visit to Memphis Mr. Judah was at Indian Bay, where I met him in company with Mr. Lee Walker. I told Judah at Indian Bay that Lee and Ernest Walker had transferred the notes and mortgages to Mrs. Walker, and delivered them to me for her account. He said it would be a very difficult matter for me to collect them, being unacquainted with the parties and so far removed from the place, and he wanted me to turn them over to him. I refused to do this; and he said that Mrs. Walker could not derive much benefit from them without
291*d* great expense, and that she would probably have to sue most of the parties to recover, while he and Mr. Silverman could more readily collect them, knowing all the parties, and it would be a great benefit to him and assistance to him. I still insisted I could not part with them. He became angry and made threats that if I didn't do it Mrs. Walker would get very little out of it, as he could fix it so that if I would not let him have them he would prevent the parties

from paying, claiming that in many instance he and Silverman had mortgages securing some of the notes, and that I did not have the mortgages with the notes. I was firm in my refusal. Before I left him that day he again asked me to let him have these notes and mortgages,
291e saying he was going into business again with Silverman, and if he had these, they would be the means of affording a basis upon which he could start in the business at Indian Bay, which he contemplated with Mr. Silverman and others, and promised from the collections he would from time to time remit to Mrs. Walker in part. I declined, however, to accede, and he refused to assist me towards the collection. I left the same day with Lee Walker and went back to Memphis and Cincinnatti with the papers. I have not seen him since. Lee Walker went with me as far as Memphis, and I spoke to him several times on the way in regard to these notes, to ascertain from him the location of the parties and the collectability, and he gave me the information as far as he knew.

6th. In answer to the 6th interrogatory he testifies as follows: I
291f know that Walker, Sons & Co. were at the time referred to and yet are indebted to Mrs. Eliza Walker. The three parties, Lee and Ernest Walker and Judah, admitted it to me in the conversations I have alluded to. I was also aware of the loan of Mrs. Walker of a part of the indebtedness, originally amounting to some 9 or $10,000; saw also, and had in my possession at one time, notes payable to Mrs. Eliza Walker, signed by Walker, Sons & Co. for the indebtedness—exact amount I do not now remember—but there were two notes, I think, in the aggregate, amounting to about $20,000. I was told by Lee Walker and Ernest Walker in Memphis, at the time stated, that the money represented by these notes was used in the business of Walker, Sons & Co., and that they had been paying interest for some time to Mrs. Walker for it. Mrs. Walker is a widow, living in Philadelphia, and had loaned this money to Walker, Sons & Co. since the death of her husband.

291g 7th. In answer to the 7th interrogatory he testifies as follows: I had several conversations with the members of the firm of Walker, Sons & Co. in regard to the ownership of the notes. After they had been transferred to Mrs. Walker and delivered to me there was no question about the ownership, so far as I knew, until after I had sent the notes for collection—after I had seen Judah at Indian Bay. Before we parted there, and I had persistently declined to let him have the notes, Judah said to me in substance, as near as I can recollect his words, that he didn't propose Mrs. Walker should have them all, and if he couldn't get them he could fix it so that Mrs. Walker couldn't get anything either. I asked him what he meant by that, and he said I would see what he meant. I told
291h him that if he wanted to try to prevent the makers of the notes from paying Mrs. Walker, or throwing anything in her way improperly, he would get himself into trouble. He replied that he was determined that if he couldn't get them she shouldn't have them, and if I would allow him & Silverman to collect them he would allow her $1,000 cash on account and he and Silverman would collect these notes, commence business on them

again, and *and* afterwards pay Mrs. Walker $4,000.00 more in instalments on account of her claim; but, upon my refusal, he then said: Well, "I'll claim them then in the name of the bank in New York." I told him he should be ashamed of himself, and I refused to have anything further to do with him about it. Lee Walker was then at Indian Bay with me, though not present at the conversation, and on my way back to Memphis I told him of Judah's threats and asked him
291*i* what he meant. Thereupon Lee Walker told me that some of these notes had once been sent to some bank in New York, I believe the Importers' Bank, as security for some loan, but the bank had returned them to Walker, Sons & Co., and declined to hold them as such, and that the bank had nothing further to do with them, and that they had been in the possession of Walker, Sons & Co. a long while before they were delivered to me. Mr. Walker also expressed surprise at Judah's statement and conduct at that time. On my return to Memphis I also spoke to Ernest Walker in regard to Judah's statements, and he told me that [the] Importers' and Traders' Bank in New York had returned the notes and refused to hold them, and that his firm had taken them back a long time before, and they belonged to Walker, Sons & Co. at the time
291*j* they were transferred to Mrs. Walker. The firm had always had possession of them after they had been returned to the bank.

8th. In answer to the 8th interrogatory he testifies as follows: I don't know of anything else pertinent.

Cross-interrogatories:

1st. In answer to the 1st cross-interrogatory he testifies as follows: I am a son-in-law of Mrs. Eliza Walker; this is the only relation.

2d. In answer to the 2d cross-interrogatory he testifies as follows: I, of course, have acted as her counsel in these matters and in this cause, though not actively engaged in the proceedings or trial of the cause. I selected Mess. Stephenson & Trieber for her.

3d. In answer to the 3d cross-interrogatory he testifies as follows: The conversations that I have referred to which took place
291*k* at my first visit, between Lee Walker and Ernest Walker, were had when Lee and Ernest Walker were both present. I know of no one else present except there was a gentleman seated in their office whom I did not know, but who seemed to be a visitor. He was only there a short while. The conversation which I referred to with Mr. Judah, at Memphis, took place in the parlor of his boarding house. His wife was present during a part of the time. I know of no one else unless, perhaps, Lee Walker may have been in and out of the room. Judah complained of being ill. The other conversations referred to with Lee Walker took place when he and I were alone together, and the conversation with Judah at Indian Bay took place between Judah and myself in front of Mr. Silverman's house, except some general conversation preceding it which took place
292 in the house. I know of no one being present. During part of the conversation referred to Mr. Silverman was standing near us, but I don't know whether he heard the conversation or not.

He appeared as though he did not want to hear it and as though he wanted to allow Mr. Judah to have a talk with me alone. The dates of these conversations I have given as near as I can now recollect.

4th. In answer to the 4th cross-interrogatory he says: I have given every conversation as it occurred from my own knowledge; I have given nothing from hearsay that I can understand to be such.

5th. In answer to the 5th cross-interrogatory he says: The members of the firm of Walker, Sons & Co., so far as I knew, were Lee and Ernest Walker and G. H. Judah; I know nothing about their private partnership arrangements, but they all appeared to act in that relation; Judah acted apparently in the same capacity
293 in my negotiations respecting Mrs. Walker's claims. I know nothing further as to this. I have already stated which members of the firm I conversed with and the times and places.

6th. In answer to the 6th cross-interrogatory he says: I have already, as fully as I can, stated the conversations which took place. I cannot recall the language any more definitely, but have given the substance of it, as nearly as I can remember it.

ADAM A. KRAMER.

STATE OF OHIO, }
Hamilton County, } ss:

I, Samuel Wolfstiene, a notary public in and for the county and State aforesaid, duly commissioned and qualified, do hereby certify that the above-named Adam A. Kramer was by me first sworn to testify the truth, the whole truth, and nothing but the truth,
294 and that the deposition by him subscribed, as above set forth, was reduced to writing by myself in the presence of the witness, and was subscribed by the said witness in my presence, and that I am no counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal this 27th day of February, 1884.

[SEAL.] SAMUEL WOLFSTIENE,
Notary Public in & for Hamilton County, Ohio.

The cost of the within deposition is ten dollars ($10), which I desire to be taxed as part of the cost of the cause.

SAMUEL WOLFSTIENE,
Notary Public, Hamilton County, Ohio.

Endorsed: Filed March 3, 1884. Samuel J. Clark, clerk.

295 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Samuel J. Clark, clerk of the United States district court for the eastern district of Arkansas, at Helena, hereby certify that the above and foregoing is a true and perfect transcript of the deposition of Adam Kramer in the above-entitled cause as the same remains of record in my office.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Helena, this 23 day of April, A. D. 1884.

SAMUEL J. CLARK,
Clerk United States District Court.

Endorsed: Filed Feb'y 25, 1884. Bell Etheridge, cl'k. W. B. Weisiger, D. C.

296 The following is the deposition of Eugene Mortimer Cave, taken in an action in the United States court, wherein Eliza Walker is plaintiff and the Manhattan Bank is defendant, pursuant to instructions received from Harris & Turley, attorneys for defendant, dated Feb'y 9th, 1885:

STATE OF NEW YORK, }
City & County of New York, } *ss:*

EUGENE MORTIMER CAVE being duly sworn deposes as follows:

1. My name is Eugene Mortimer Cave; my age is thirty years; my residence is at Bergen Point, New Jersey; my present occupation is that of a broker.

2. I was engaged in the brokerage business in the month of February, 1882.

3. The business of L. Levy in February, 1882, was banking & brokerage.

4. It was.

5. A book of record was kept in Feb'y, 1882.

297 6. On inspecting said book of record I find that $3,000 Mem. & Ch's. R. R. 2d-m't'g. b'ds were held for *atc.* of Manhattan Bank, Memphis, Tenn., in Feb'y, 1882.

7. I find from some source (the book of record) that the bonds were shipped by L. Levy to Manhattan Bank, Memphis, Tenn., per Adams Express Co., on February 24th, 1882.

8. The only evidence I have of Mr. Levy's having gotton his receipt back is in the following extract from a letter rec'd from Mr. Maas at cash., dated Feb'y 27th, 1882, as follows: "I have rec'd your favors of the 23rd & 24 inst., also 3,000 M. & C. 2d — by express. I enclose your receipt duly cancelled. The receipt herein mentioned cannot at present be found.

Answers to Interrogatories.

Int. 1. He is.

Int. 2. General broken, and had occupied same for about three years.

298 Int. 3. Mr. Edward Goldsmith, now cashier of the Manhattan Bank, was, in Feb'y, 1882, in Mr. L. Levy's service. He was general manager of Mr. Levy's business, and had been connected with said business for about one year.

Int. 4. Banking brokerage, at No. 8 Wall St.

Int. 5. I only know that, from inspection of Mr. Levy's book of record, he (Mr. Levy) held 3,000 Mem. & Ch's. 2d-m't'g. b'ds for

account of Manhattan Bank, Memphis, Tenn. I was not present when Mr. Levy received the bonds, nor did I have any connection whatever with the delivery of said bonds.

Int. 6. My only knowledge of a receipt being returned to Mr. Levy is from Mr. Maas' letter (acknowledging receipt of the bonds at Memphis), Feb'y 27th, referred to above.

299 Int. 7. I was Mr. Levy's broker.

Int. 8. Mr. Levy is a stockholder & a *sinester* of the Manhattan Bank.

Int. 9. He does attend to business for the bank in New York city, & did so in Feb'y, 1882.

EUGENE M. CAVE.

Sworn to before me this 24th day of February, 1885, as witness my hand & official seal.

IRA H. TUTHELL,

(30) *Notary Public in and for the City, County, and State of New York, 10 Wall street, New York.*

[Endorsed:] No. 384. Circuit court of the United States, western district of Tennessee. Eliza Walker *vs.* City of Memphis. Deposition of Eugene M. Cave. Filed Feb'y 25th, 1882. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

300 *Transcript of Record. Filed Feb.* 25, '85.

UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

Be it remembered that at a regular term of the district court of the United States for the eastern district of Arkansas, begun and holden at the Federal court-room, in the city of Helena, on the 2d Monday in March, A. D. 1884, the same being the 10-day of said month, there was present and presiding Hon. Henry C. Caldwell, judge of said court; James Torrens, marshal of said district, and Samuel J. Clark, clerk of said court, when, among other proceedings had, were the following, on the — day of ——, 1884, a day of said term, viz:

Partial Transcript of Record.

301 In the District Court of the United States for the Eastern District of Arkansas, at Helena. In Equity.

RAPHAEL BUCHMAN *vs.* ELIZA WALKER *et als.*

Answer and cross-bill of defendant Eliza Walker.

The defendant, Eliza Walker, for answer to the plaintiff's bill, says it is not true that said notes described in the complaint were ever hypothecated or pledged with plaintiff to secure any sum of money due him from Walker, Sons & Co., but on the contrary she alleges the truth to be that plaintiff never did have any right, title, or interest whatever in and to said notes or any of them. Defendant denies that in December, 1882, or at any other time, plaintiff sent said notes to

said Walker, Sons & Co.; the same were delivered to one G. H.
302 Judah to be returned to plaintiff, and then fraudulently appropriated by Ernest Walker, and without any consideration, and with a fraudulent intent, delivered to defendant; but she declares the truth to be that said notes had been the property and in the possession of said Walker, Sons & Co. ever since October, 1862, and up to the time the same were transferred and assigned to this defendant; that plaintiff had no right or claim to said notes; that said G. H. Judah was a silent member of the firm of Walker, Sons & Co., as owing to the fact that but a short time prior thereto he had suspended in business with liabilities of several hundred thousand dollars still unsatisfied; he was afraid to transact business under his own name, and as such member of said firm of Walker, Sons & Co.
303 he had an interest in said notes, but not as agent for plaintiff, who was too well acquainted with the character and standing of said Judah to entrust*ing* [him] with any valuable property.

Defendant further states that the true consideration of the assignment, transfer, and delivery to her of said notes by Walker, Sons & Co. was that when or about the time that said firm was organized she loaned to them of her own money, most or nearly all of which she had but recently before that time collected on several policies on the life of her deceased husband, the sum of twenty thousand ($20,000.00) dollars, for which [she] was to receive interest at the rate of — per cent. per annum; that having confidence in the honesty of said parties she required no security, and more especially relying on the honesty and integrity of said Judah, who was a silent mem-
304 ber of said firm, who violated all her confidence, and, acting in collusion with a certain bank in Memphis, has endeavored to defraud and cheat this defendant in every possible way.

That in January, 1883, at the time the said Walker, Sons & Co. found themselves to be insolvent, Ernest Walker, one of the firm, for the purpose of securing *to* this defendant for the large sum of money due her, assigned and delivered said notes, for and on behalf of said Walker, Sons & Co., to this defendant, and she now holds said notes as such security in good faith.

Defendant admits that said H. & L. Silverman and Walker, Sons & Co. are wholly insolvent, but she denies that she is insolvent, but, on the contrary, alleges that she is indebted to no one, and is a widow, living with her family of children in the city of Philadelphia, Pa.

305 Defendant further states that plaintiff's claim to the ownership of said notes is wholly false and is only made for the fraudulent purpose of aiding and assisting said H. & L. Silverman and said Judah, who is now a partner in — business of said Silverman's, to cheat & defraud this defendant out of her money for their benefit, and for no other purpose is this suit instituted by plaintiff. And having fully answered defendant prays that this bill be dismissed and that she have a decree for the money now in the registry of this court in this action. And by way of a counter-complaint and cross-bill against the said Raphael Buchman the defendant in the

original bill and plaintiff in this cross-bill, Eliza Walker, complains
of said Raphael Buchman, who is asked to be made a party
306 defendant to this cross-bill, and charges that the said H. & L.
Silverman and G. H. Judah, shortly after the failure of the firm to which they belonged, fraudulently and corruptly formed a copartnership to carry on business at Indian Bay and St. Charles, in the State of Arkansas, using as their capital the assets belonging to their former respective firms, and which they had successfully secreted from their creditors; that being unable to carry on said business in their own name they organized a corporation under the laws of the State, of which H. Silverman is president, L. Silverman a director, and Judah secretary and treasurer.

That defendant in this cross-bill, Buchman, for the purpose of assisting them in their fraudulent designs & attempts to collect and
enable them to appropriate to their own use, not only the
307 assets which belong to the late firm of H. & L. Silverman, but
also to obtain the notes in controversy in this action and thus defraud this plaintiff out of the money justly due her, permitted said parties to use his name and claim for him the ownership of said notes; also to collect the same and foreclose mortgages given to secure said notes as if in truth and fact he was the owner of them.

That by reason thereof said parties, for and in behalf of said Buchman, have collected on said notes and taken property from the makers thereof, and also taken new notes and securities satisfying the old mortgages of record, amounting in value to several thousand dollars, but the exact amount plaintiff in this cross-bill is unable to tell, nor the names of the various parties from whom said collections
were made, or new securities taken.

308 That said Buchman and his pretended agents well knew that they had no authority or right to collect the same, as the said notes were the property of your oratrix, and that although payment to him or his agents by the makers of said notes was no payment at all, still nearly all of said debtors are wholly insolvent, and the mortgaged property was the only means of enabling the holder of the notes to collect them, and that having been taken and disposed of by said Buchman, this plaintiff is wholly remediless at law; that although said Buchman did not have possession of said notes, they being in plaintiff's possession, yet the said debtors, being mostly ignorant people, inexperienced in business matters, and ignorant of the law, were induced by threats & promises on the part
of the said Buchman's agents to pay the money or deliver the
309 property over to them, under the impression that they were
really entitled to collect the same.

Wherefore plaintiff, in this cross-bill, prays for a discovery from said Buchman, defendant herein, requiring him to state and answer fully under oath—

First. What amounts of money he or his agents have collected on said notes, giving the names, dates, and amounts collected from each person.

Second. What property he has received or caused to be taken from

the makers of said notes, giving the names, dates, and value of property in each instance.

Third. For what amounts he has taken new securities, giving the names, dates, and a description of the property on which said security is taken.

And that upon the final hearing of this bill she have a decree against said Buchman for the amounts so received and col-
310 lected by him or his paid agents, as hereinbefore charged, with interest thereon, and that he be declared a trustee for your oratrix as to the property held by him as mortgagee or otherwise on account of said notes, and that he be required to transfer said securities properly endorsed to her, and for such other relief as in equity she may be entitled to.

STEPHENSON & TREIBER,
H. A. PARKER AND
LONG, KRAMER & KRAMER,
Solicitors for Def't & Plaintiff in Cross-Bill.

STATE OF PENNSYLVANIA, }
County of Philadelphia, } *ss:*

Eliza Walker states on oath that the allegations in the foregoing answer & cross-bill are true to the best of her knowledge and belief.

ELIZA WALKER.

311 Subscribed and sworn to before me, a notary public in and for the county & State aforesaid, this twenty-first day of August, 1883.

THOS. M. LONGCOPEE,
Notary Public in & for Philadelphia County, Penn.

Endorsed: Filed Aug. 27, 1883. Samuel J. Clark, clerk.

Deposition of Mrs. Walker.

UNITED STATES OF AMERICA, STATE OF PENNSYLVANIA,
County of Philadelphia, City of Philadelphia:

I certify that on the twenty-seventh day of September, A. D. 1883, before me, a notary public in and for the city and county of Philadelphia aforesaid, in the State of Pennsylvania aforesaid, duly commissioned and qualified at —, in said city, county, and State,
312 between the usual hours of business, was produced to and personally came before, Eliza Walker, a witness in behalf of the defendant, to depose in a cause depending in the district court of the United States for the eastern district of Arkansas, wherein Raphael Buchman is plaintiff and Ellen Walker is defendant in an action in equity, and whose testimony is alleged to be material in said civil cause in behalt of the defendant.

And said witness, being of lawful age and sound mind, and being by me first carefully examined, cautioned, and duly sworn to testify the whole truth and nothing but the truth touching the matters in controversy in said civil cause, did depose and say as follows, in answer to the interrogatories hereto annexed, marked T. M. L.:

313 As to 1st. Eliza Walker; No. 510 N. 5th St., Philadelphia; household duties.

As to 2d. I am the defendant in this suit.

Third. I am the owner of the notes in controversy in this suit.

Fourth. I became the owner of these notes January, 1883. I received them from Walker, Sons & Co. through my attorney, Adam A. Kramer, Esq. The notes were transferred to me to secure notes which I held of Walker, Sons & Co., which I send herewith. (A copy of each is hereto appended.) These notes are evidence of the money due me as the notes of Walker, Sons & Co., and still unpaid.

Fifth. These notes were given to me to secure the payment of two notes, debts due me by Walker, Sons & Co., and at the time they were given me nineteen thousand seven hundred and sixty-
314 four dollars and twenty-nine cents was due me by said Walker, Sons & Co., and that amount is still due me and nothing has been paid on account thereof since then.

Sixth. I never knew or heard of Buchman's claim to be the owner of said notes or his having any interest whatever in them until this suit was brought.

Seventh. I know nothing whatever of Buchman's claim to said notes.

Eighth. I know nothing that will throw any light on this controversy further than as stated above. The money was advanced and paid by me to Walker, Sons & Co., and I have never received anything in return for it except the notes mentioned, which are unpaid.

Cross-interrogatories:

First. I advanced Walker, Sons & Co. the money & took
315 their notes, which were and still are unpaid. The notes in controversy were transferred to me to secure the payment of the notes of Walker, Sons & Co.

Second. The debt of Walker, Sons & Co. to me was contracted, part of it, in October, 1880, and the balance of it at intervals between January & June, 1881. On Oct. 13th, 1880, I advanced Walker, Sons & Co. $10,000. January 14, 1881, I advanced $4,791.75. On Feb'y 28, 1881, I advanced to them $2,000. On June 6, '81, I advanced $2,972.54, for which they gave me the notes, a copy of which are appended hereto. At the time the notes were received by me I thought the financial condition of Walker, Sons & Co. was good. I am now referring to the notes given me and signed by Walker, Sons & Co., but when the notes in controversy were assigned to me
316 I did not know their financial condition except that they were slow in paying me my interest. The notes of Walker, Sons & Co. were due June 1, 1882.

Third. I never had any other security for the money advanced to Walker, Sons & Co. except their notes and the notes and mortgages in controversy sent to Helena, and I now am secured in no other way. I am not the plaintiff against the Manhattan Bank in an action to recover the same debt. My suit with them is for another debt and had nothing to do with the notes in controversy. I am not trying to collect it from any one else.

Fourth. I do not know of any seizure or legal process against Walker, Sons & Co. prior to the transfer of said notes to me. I do not know whether they were doing business at the time.

Fifth. They are all related to me. Ernest L. Walker is my
317 son. Leon Walker is my nephew. G. H. Judah is a connection by marriage.

Sixth. Walker, Sons & Co., by my attorney, Adam A. Kramer, Esq.

ELIZA WALKER.

Sworn to and subscribed before me this 27th day of September, A. D. 1883.

[SEAL.]

THOS. M. LONGCOPEE,
Notary Public.

Copy of Note.

$9,764.29. MEMPHIS, TENN., *May* 31, 1882.

One (1) day after date we promise to pay to the order of Mrs. Eliza Walker ninety-seven hundred sixty-four $\frac{29}{100}$ dollars, with interest at 6% after maturity.

(Signed) WALKER, SONS & CO.

Value received.
No. —.
Due —.

$10,000.00. MEMPHIS, TENN., *May* 31, 1882.

One (1) day after date we or either of us promise to pay to the order of Mrs. Eliza Walker ten thousand dollars, with interest
318 at 7 per [cent.] after maturity.

(Signed) E. L. WALKER.
WALKER, SONS & CO.

Value received.
No. —.
Due —.

The above copies of notes are made by me from what are represented to me to be the originals now before me.

THOS. M. LONGCOPEE,
Notary Public.

In the District Court of the United States for the Eastern District of Arkansas, at Helena. In Equity.

RAPHAEL BUCHMAN *vs.* ELIZA WALKER *et als.*

It is hereby agreed that the depositions of Eliza Walker may be taken upon the interrogatories and cross-interrogatories hereto annexed before any notary public, and thereupon read in the
319 above-entitled cause, pending in the same court on the law

side thereof, wherein the question of ownership of the notes in controversy in this suit is involved.

SECIL BOBO, *Att'y for Pl'ff.*
STEPHENSON & TREIBER & PACKER,
Att'ys for Def'ts.

T. M. L.—Interrogatories to be propounded to Mrs. Eliza Walker and to be answered under oath by her:

First. State your name, residence, and occupation.

Second. Are you one of the defendants to this suit?

Third. Who is the owner of the notes in controversy?

Fourth. If you say that you are the owner of them, please state fully when you became the owner of them, who you received them from, what consideration you paid for them, when and to whom you paid it, and if you have any written evidences thereof file
320 them herewith as part of your deposition.

Fifth. If you state that the consideration for the transfer of these notes now in controversy to you was to secure to you the payment of a debt due from Walker, Sons & Co., please state how much was due you at the time these notes were transferred and delivered to you, and state also whether any payments have been made to you on account of that indebtedness since then. If so, how much have you received, and how much is still due you from said Walker, Sons & Co. this day?

Sixth. Did you ever hear of plaintiff Buchman's claim to be the owner of or having any interest whatever in and to said notes? If so, when were you first informed thereof?

Seventh. Do you know anything whatever of Buchman's claim to the ownership of said notes?

Eighth. State anything further you may know of the matters
321 in controversy herein that may be of benefit to plaintiff or defendants, or that will throw any light on the subjects in controversy.

STEPHENSON & TREIBER & PACKER,
Solicitors for Defendants.

Cross-Interrogatories.

1st. If, in answer to the third interrogatory, you say you are the owner of the notes in controversy, please state when you became such, and what you paid for them.

2d. If you state, in answer to the 5th interrogatory, that the notes were transferred to you to secure a debt due you from Walker, Sons & Co., please state when the debt was contracted, when due and the nature thereof, when the notes were so transferred to you, and the financial condition of Walker, Sons & Co. at the time the transfer was so made.

3d. If you say the notes were transferred to you to secure
322 a debt, state what other security you held at the time or now for the same debt, and whether or not you are not now plain-

tiff in an action against the Manhattan Bank to recover the same debt from the bank or from any one else.

4th. State whether or not the assets, or any part thereof, of the firm of Walker, Sons & Co. had been seized by legal process sued out by their creditors prior to the transfer to you of said notes, and to what extent, and were they doing business at the time?

5th. What relation, if any, are you to the members of the firm of Walker, Sons & Co., or to any of them?

6. State who delivered you the notes.

SECIL BOBO,
For Plaintiff.

323 *Deposition of Lee Walker.*

U. S. Dist. Court, at Helena.

E. WALKER *vs.* C. D. DAWSON.

Interrogatories to be propounded to Lee Walker.

1st. State your name, age, residence, and occupation.

2d. Are you acquainted with the parties to this suit, with Walker, Sons & Co. & R. Buchman, or any of them? Are you related to any of them, & in what way?

3. Were you a member of the firm of Walker, Sons & Co. in 1882 & 1883; and, if yea, who kept the books of said firm?

4. Were you familiar with the business of said firm?

5. If you say you were the book-keeper of said firm, state
324 if said books showed any indebtedness, & for what amount, if any, to Mrs. E. Walker, the plaintiff in this suit.

6. Did the firm of Walker, Sons & Co. have any business transactions in 1882 with R. Buchman, of New York? If yea, state all you know concerning the same.

7. If said firm borrowed any money of or through him, state what security or collaterals, if any, they gave him.

8. State what became of said collaterals or securities, if you know.

9. State fully and particularly all you know concerning the whole transaction beneficial to either party.

SECIL BOBO AND PALMER & NICHOLS,
For R. Buchman.

325 *Cross-Interrogatories.*

First. What is your present occupation, & is Raphael Buchman one of your employees?

Second. If you state what became of the collaterals alleged to have been delivered to Buchman please state fully when they were returned to Walker, Sons & Co., by whom they were returned, how they were returned, by mail or otherwise, and what were the instructions in regard to them accompanying the note?

Third. Were any other note- except those in controversy ever sent sent by you or Walker, Sons & Co. to the Importers' & Traders' Bank of New York? If so, when, what kind of notes, & for what purpose?

Fourth. Did you shortly after the failure of Walker, Sons & Co. meet Mr. Adam A. Kramer, att'y for Mrs. E. Walker, plaintiff
326 herein, in Memphis and converse with him in regard to the notes now in controversy?

Fifth. Did you then and there tell Mr. Kramer that the money claimed by Mrs. Walker from Walker, Sons & Co. was justly due her?

Sixth. Did you then and there state to Mr. Kramer that the notes now in controversy were the property of Walker, Sons & Co., subject to their disposal?

Seventh. Did you then and there consent to the delivery of these notes to Mr. Kramer for Mrs. Walker & state that you hoped she would succeed [in] getting out of some of the money due her from Walker, Sons & Co?

Eighth. Were not a large number of these collateral notes, especially those for large amounts, sent by the Importers' & Traders'
327 Bank of New York to their Memphis correspondent for collection, & at maturity paid by Walker, Sons & Co. to the bank holding them for account of the Importers' & Traders' Bank?

Ninth. Were you present at the time these notes are alleged to have been delivered to Mr. Buchman? If so, state where & when it occurred.

Tenth. Did you have any conversation or correspondence with any parties as to what you should testify in this case? If so, state with whom & when; if correspondence produce the letters & file them herewith.

LONG, KRAMER & KRAMER,
STEPHENSON & TREIBER, &
H. A. PACKER, *Sol's for Pl'ff.*

U. S. District Court, at Helena.

E. WALKER *v.* C. D. DAWSON.

328 The deposition of Lee Walker, taken on the 7th day of December, 1883, between the hours of eight o'clock a. m. and five o'clock p. m., at the office of William F. Lett, No. 335 Broadway, in the city of New-York, county of New York, and State of New York, to be read as evidence in an action between E. Walker, plaintiff, & C. D. Dawson, defendant, pending in the U. S. dist. court at Helena, Arkansas.

LEE WALKER, being duly sworn to speak the truth, the whole truth and nothing but the truth, deposeth & says, as follows:

1st Int. To the first interrogatory he saith: My name is Lee B. Walker; I am twenty-six years old; I reside in Philadelphia; am not engaged in any business at present.

2d Int. To the second interrogatory he saith: I am acquainted with the plaintiff in this suit, but not with the defendant, C. D. Dawson; am also acquainted with Mr. R. Buchman, and
329 have been a member of the firm of Walker, Sons & Co. I am a nephew of the plaintiff.

3d. To the third interrogatory he saith: I was a member of the firm of Walker, Sons & Co. in 1882 & 1883, & kept the books of the firm.

4th. To the fourth interrogatory he saith: Yes, as regards any direct transaction made by the firm.

5th. To the fifth interrogatory he saith: I was the book-keeper of said firm; there was no direct entry of a credit on the books of Walker, Sons & Co. in favor of Mrs. E. Walker, but there was a credit on bills payable account of some ninety-seven hundred dollars for money belonging to Mrs. E. Walker.

6th. To the sixth interrogatory he saith: The firm of
330 Walker, Sons & Co. had considerable business transactions in 1882 with Mr. R. Buchman. Mr. E. L. Walker, of the firm of Walker, Sons & Co., went to Mr. Buchman in order to negotiate a loan in the month of June, 1882; he negotiated for a loan through Mr. R. Buchman from the Importers' & Traders' Bank of New York, amounting to twenty-two thousand dollars, and in the month of July negotiated a further loan through Mr. Buchman for six thousand dollars. These two loans were made to Walker, Sons & Co. by the Importers' & Traders' Bank on Walker, Sons & Co.'- notes maturing at different dates, and were guaranteed to the Importers' & Traders' Bank by Mr. R. Buchman.

7th. To the seventh interrogatory he saith: To secure Mr. R. Buchman for his guarantee of the loan we delivered to Mr. R. Buchman a number of notes, including the ones now in controversy, as collaterals.

331 8th Int. To the eighth interrogatory he saith: At the request of Walker, Sons & Co., made to Mr. R. Buchman, the collateral notes were all sent to Walker, Sons & Co. for collection.

9th. To the 9th interrogatory he saith: Mr. Ernest L. Walker, of the firm of Walker, Sons & Co., went to New York to effect a loan on notes of Walker, Sons & Co. He called on Mr. R. Buchman and requested him to effect the loan. Mr. R. Buchman obtained the desired loan from the Importers' and Traders' Bank of New York, and gave his personal guarantee to the Importers' and Traders' Bank for the amount obtained. In order to secure Mr. R. Buchman against any loss, he having guaranteed the amount, we gave him a number of our bills receivable, and the notes now in dispute were amongst the number. At the special request of Walker, Sons & Co. the notes
332 were returned to Walker, Sons & Co. for collection. The notes belonging to Mr. R. Bochman and now held by Mrs. E. Walker were delivered to her without the knowledge or consent of any of the firm of Walker, Sons & Co., except her son, E. L. Walker, and she obtained them from her son after the failure of Walker, Sons & Co. The notes were the sole property of Mr. R. Bochman until Mr. E. L. Walker undertook to appropriate them for the benefit of his mother.

Cross-examination:

X Int. 1. To the first cross-interrogatory he saith: I am unemployed at present. Mr. R. Bochman is not one of my employees.

X Int. 2. To the second cross-interrogatory he saith: The collateral notes delivered to Mr. R. Bochman were sent to Walker, Sons & Co. at various times before maturity. They were sent through the Importers' and Traders' Bank by mail, and instructed in regard to them to send renewals or others.

X Int. 3. To the third cross-interrogatory he saith: There were no other notes sent to the Importers' and Traders' National Bank of New York, but some of the collateral notes maturing prior to the maturity of the loan were replaced by renewals.

X Int. 4. To the fourth cross-interrogatory he saith: Yes.

X Int. 5. To the fifth cross-interrogatory he saith: I did not.

X Int. 6. To the sixth cross-interrogatory he saith: I in-
333 formed Mr. Kramer that the notes now in controversy were not the property of Walker, Sons & Co., but belonged to Mr. R. Bochman.

X Int. 7. To the seventh cross-interrogatory he saith: No; I did not.

X Int. 8. To the eighth cross-interrogatory he saith: Some of the collateral notes, not a large number, sent by the Importers' and Traders' Bank to their Memphis correspondent for collection, which were paid by Wilkinson & Co. by their drafts for the same amounts made on Mr. R. Bochman, — by his consent sent to Walker, Sons & Co. by telegram; otherwise they would and could not have been paid.

X Int. 9. To the ninth cross-interrogatory he saith: I was not present at the delivery of all the notes, but some of them were sent direct from Memphis.

X Int. 10. To the tenth cross-interrogatory he saith: I had a conversation with Mr. R. Bochman in the month of September in regard to this controversy, and informed him that if any testimony should be required in this case that I was prepared to [tell] the truth, as I did in the foregoing. There was never any correspondence in the matter.

LEE B. WALKER.

STATE OF NEW YORK, }
County of New York, } *ss:*

I, William F. Lett, a notary public in and for said State and county, do certify that the foregoing deposition of Lee B.
334 Walker was taken before me and was read to and subscribed by him in my presence at the time and place mentioned in the caption, the said Lee B. Walker having been first sworn by me that the evidence he should give in the action should be the truth, the whole truth, and nothing but the truth, and his statements were reduced to writing by me in his presence, neither plaintiff nor defendant, or by their attorney, being present at the examination.

Witness my hand and seal of office, at New York city, on this 7th day of December, A. D. 1883.

[SEAL.] WM. F. LETT,
Notary Public for Kings County and the State of New York.

STATE OF NEW YORK, *City & County of New York:*

I, Patrick Keenan, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that Wm. F. Lett has filed in the clerk's office of the county of New York a certified copy of his appointment as notary public for the county of Kings, with his autograph signature, and was at the time of taking the annexed deposition duly authorized to take the same, and that I am well acquainted with the handwriting of said notary public, and verily believe that the signature of the annexed certificate is genuine.

335 In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 7th day of December, 1883.

[L. S.] PATRICK KEENAN, *Clerk.*

Filed in the court December 22, 1883.

SAM'L J. CLARK, *Clerk.*

UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

I, Samuel J. Clark, clerk of the United States district court for the eastern district of Arkansas, at Helena, hereby certify that the above and foregoing is a true and perfect transcript of the matters and things therein set forth, as the same remain of record in my office.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Helena, this 8th day of Ap-il, A. D. 1884.

SAMUEL J. CLARK,
Clerk United States District Court.

336 U. S. Circuit Court, District of West Tennessee.

ELIZA WALKER
v.
THE MANHATTAN BANK. } No. 384. Equity Docket.

It is agreed that Mr. Krauser'- deposition in the case of R. Bookman *v.* Walker, at U. S. court, Helena, Ark., may be read by the defendant, or part, at its cross-examination of Mr. Krauser in this cause.

It is further agreed that defendant received no compensation for the custody of the bonds & notes & stocks sued for herein as bailee after their purchase and deposit with the bank.

It is further agreed that said Memphis & Charleston R. R. bore seven per cent. interest, payable semi-annually, and evidenced by interest coupons maturing Jan'y 1st & July 1st of each year, and that the bonds matured on the 1st day of Jan'y, 1885.

337 It is further agreed that said Mississippi Central R. R. bonds bore eight per cent. interest, payable semi-annually, evidenced by coupons maturing Feb'y 1st & August 1st, and that said bonds matured on the 1st day of Feb'y, 1885.

It is further agreed that no exception will be taken to any of the

records produced from the case of Bockman *v.* Eliza Walker, for want — proper certificate or form.

Feb'y 26th, 1885.

TURLEY, *For Def'nd't.*
LEHMAN & LEHMAN,
METCALF & WALKER,
For Plaintiffs.

[Endorsed:] No. 384. Equity. Circuit court of the United States, western district of Tennessee. Eliza Walker *v.* Manhattan Bank. Filed Feb. 25th, 1885. Bell W. Etheridge, cl'k. W. B. Weisiger, D. C.

338 UNITED STATES OF AMERICA,
— *Division of the Western District of Tennessee:*

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1884, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 25 day of February, A. D. 1885, in the following cause, to wit:

ELIZA WALKER, Plaintiff,
vs.
MANHATTAN BANK, Defendant. } No. 384.

By the agreement of counsel in open court and for satisfactory reasons to the court appearing, it is hereby ordered by the court that this cause be, and the same is hereby, set for hearing on to-morrow morning, the 26th inst.

339 UNITED STATES OF AMERICA,
— *Division of the Western District of Tennessee:*

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1884, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 26 day of February, A. D. 1885, in the following cause, to wit:

ELIZA WALKER, Plaintiff,
vs.
MANHATTAN BANK, Defendant. } No. 384.

The trial of this cause, which was heretofore set for to-day, came on to be heard, and the evidence thereof having been concluded, the argument of counsel was commenced, when, there not being sufficient time to conclude the same on to-day, the further consideration thereof is hereby postponed till to-morrow morning.

340 UNITED STATES OF AMERICA,
— *Division of the Western District of Tennessee:*

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof begun and held for its November term, A. D. 1884, at the United States court-house in the city of Memphis, in said district, on, to wit, the 27- day of February, A. D. 1885, in the following cause, to wit:

ELIZA WALKER, Plaintiff,
vs.
MANHATTAN BANK, Defendant. } No. 384.

Came again the parties to this suit, by their respective counsel, when the trial thereof was resumed, but there not being sufficient time to conclude the same on to-day, the further consideration thereof is hereby postponed till to-morrow morning.

341 UNITED STATES OF AMERICA,
— *Division of the Western District of Tennessee:*

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennesse, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof begun and held for its November term, A. D. 1884, at the United States court-house in the city of Memphis, in said district, on, to wit, the 28- day of February, A. D. 1885, in the following cause, to wit:

ELIZA WALKER, Plaintiff,
vs.
MANHATTAN BANK, Defendant. } No. 384.

Came again the parties to this suit, by their respective counsel, when the trial of this cause was resumed, but there not being time sufficient to conclude the same on to-day, the further consideration thereof is hereby postponed till Monday morning next at 9½ o'clock.

342 UNITED STATES OF AMERICA,
— *Division of the Western District of Tennessee:*

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof begun and held for its November term, A. D. 1884, at the United States court-house in the city of Memphis, in said district, on, to wit, the 2d day of March, A. D. 1885, in the following cause, to wit:

ELIZA WALKER, Plaintiff,
vs.
MANHATTAN BANK, Defendant. } No. 384.

Came again the parties, by their respective counsel, whereupon the argument of this cause was resumed and concluded and the cause taken under advisement by the court.

343 UNITED STATES OF AMERICA,
— Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof begun and held for its May term, A. D. 1885, at the United States court-house in the city of Memphis, in said district, on, to wit, the 2d day of October, A. D. 1885, in the following cause, to wit:

ELIZA WALKER, Plaintiff,
vs.
MANHATTAN BANK OF MEMPHIS, TENN., Defendant. } No. 384.

This cause came on to be further heard at this term and was argued by counsel, and thereupon upon consideration thereof it was ordered, adjudged, and decreed as follows:

1. That the complainant, Eliza Walker, is entitled to recover of the defendant, the Manhattan Bank of Memphis, the sum of five thousand dollars, with interest thereon from the date of its maturity,
344 to wit, 1st day of November, 1881, being the amount of the promissory note of E. Goldsmith mentioned in the original bill herein, which the defendant collected and appropriated to its own use.

2. That the defendant is not liable to the complainant for any of the other items mentioned in the bill besides said promissory note, and that as to said other items complainant is entitled to no relief. Wherefore it is ordered, adjudged, and decreed that the complainant recover of the defendant five thousand dollars, and eleven hundred and seventy-five dollars, the interest thereon from the 1st day of November, 1881, making in the aggregate six thousand one hundred and seventy-five dollars, for all of which let execution issue as at law, and that neither party shall recover any costs of the other; all of which is finally ordered, adjudged, and decreed in this cause.

345 UNITED STATES OF AMERICA,
— Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof begun and held for its May term, A. D. 1885, at the United States court-

house in the city of Memphis, in said district, on, to wit, the 2d day of October, A. D., 1885, in the following cause, to wit:

ELIZA WALKER, Plaintiff,
vs.
MANHATTAN BANK OF MEMPHIS, Defendant. } No. 384.

In this cause the defendant, the Manhattan Bank, appeared in open court and prayed an appeal to the Supreme Court of the United States from the decree heretofore entered herein against it; and having given bond in the sum of ($8,000.00) eight thousand dollars, as required by law, which is approved by the court, said appeal is granted, and the plaintiff being present in open court waives citation.

346 Supreme Court of the United States.

Know all men by these presents that we, The Manhattan Bank of Memphis, Tenn., and T. H. Milburn, are held and firmly bound unto Eliza Walker in the sum of eight thousand dollars, to be paid to the said Eliza Walker, her executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 2d day of October, 1885.

Whereas the above-named, The Manhattan Bank of Memphis, Tennessee, hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled action by the circuit court of the United States for the western district of Tennessee against it:

Now, therefore, the consideration of this obligation is such that if the above-named Manhattan Bank of Memphis, Tenn., shall prosecute its said appeal to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE MANHATTAN BANK,
Per HARRIS & TURLEY, *Sol's.* [SEAL.]
T. H. MILBURN. [SEAL.]

Acknowledged before me this 2 day of October, 1885.

E. S. HAMMOND,
Judge, &c.

Approved.
E. S. HAMMOND,
Judge, &c.

[Endorsed:] No. 384. Eq. Circuit court of the United States, western district of Tennessee. Eliza Walker *vs.* Manhattan Bank of Memphis. Appeal bond *writ of error bond* to United States Supreme Court. Filed the 2 day of Oct., A. D. 1885. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

347 Circuit Court, W. D. Tennessee. October 1, 1885. In Equity.

WALKER *v.* MANHATTAN BANK.

1. *Bailment by Agent—Bank—Special Deposit—Appropriation of the Fund to a Debt Due the Bank.*—Where a bank receives securities upon a special deposit from an agent charged with the management of the fund, it cannot, without express authority from the principal, or that which may be necessarily implied from the particular facts concerning the agency, apply the proceeds to a debt due to itself from a third person. The authority will not be implied because the agent had control for the purposes of investment, and the principal had consented to other investments from the funds in the hands of the agent in loans to that third person, who was a son of the principal.

2. *Same—Redelivery to the Agent—Liability of the Bank for Subsequent Breach of Trust by the Agent—Knowledge of the Bank.*—But where the bank redelivered a part of the securities on special deposit to the agent, and he subsequently pledged them to another bank for a loan to the firm of which the principal's son was a member, it is not liable for their value to the principal, unless it had notice of a revocation of the agent's authority, or unless it had, not only a knowledge of the fact that the agent was about to make that use of the fund, but also of the fact that such use was without authority by the principal and a breach of his trust.

3. *Same—Effect of Deposit Receipt.*—Where the agent, having for a time a special deposit in his own name as agent, asked the bank for a receipt showing that fact, which he or the bank sent to the principal without any knowledge by the bank that the principal intended to revoke the agency, and where the principal continued to deal with the agent in relation to the fund, and did not at all communicate with the bank for a long time after the receipt was given, this does not amount to a change of the contract of bailment from one with the agent to one with the principal.

This was a bill to charge the defendant bank as a trustee, and for a breach of trust concerning a special deposit. The court preceded the opinion with the following statement of facts:

The firm of Walker Bros. & Co., composed of the plaintiff's husband, his brother, and G. H. Judah, was a large mercantile house in Memphis that disastrously failed and made an assignment. The plaintiff and the wife of the other brother, being creditors of the firm for large amounts due them for loans to the firm, owned the book accounts, which were bought for their use by Judah in the name of Maas, the book-keeper, at the assignee's sale, the husband of plaintiff paying for her share. These books, with the knowledge and consent of plaintiff and her husband, who afterwards died—but it seems without any specific instructions of any kind—were left with Judah to collect the debts and manage the fund for the two beneficiaries who resided in other cities. His control over the funds was of the most plenary character. He married a sister of the two

brothers and had been the most active member of the firm and was best acquainted with its business. The collections were deposited with the defendant bank in his name as "guardian," or in the name of Maas, the former book-keeper of the firm, who became the book-keeper and assistant cashier of the defendant bank. Prior to November 27, 1880, Judah had purchased certain securities with the funds, which he kept on special deposit with the bank or in the name of Maas. On that day he came to the bank and asked Maas for a receipt showing the special deposit to send to the plaintiff. The bank was not in the habit of giving receipts or certificates for these special deposits, but kept them noted by numbers in a book used for that purpose. Maas wrote a receipt on a sheet of the bank's letter-paper, and, according to his and Judah's testimony, placed it in one of the bank's envelopes addressed to the plaintiff, and put it with the bank's mail. The plaintiff and her daughter swear that it was accompanied by a letter from Maas. What was in the letter does not appear, and, not being preserved, it has not been produced, but is supposed to have been burned as useless. The routine of the bank was that Goldsmith, the cashier, personally signed and inspected every letter and himself enveloped and addressed them. This letter he did not see or sign, and it was never copied into the letter-press. The receipt was as follows:

"Manhattan Bank of Memphis.

"L. Levy, president; L. Hanauer, vice-president; E. Goldsmith, cashier; M. Maas, ass't cashier.

"MEMPHIS, TENN., *November* 27, 1880.

"G. H. Judah, Esq., agent for Mrs. Eliza Walker, of Philadelphia, has placed with us on special deposit—

"$3,000, Memph. & Charl. R. R. 2d-m'tg. bonds.
"$2,200, Miss. Central " " "
"$1,100, People's Insurance Co. stock.
"$5,000, Note E. G., and collateral attached, $6,000 M. Bank stock.
"$325, interest notes (4 @ $81.25).

"MAURICE MAAS,
"*Ass't Cashier.*"

Some time in 1880 the son of the plaintiff and a son of the other Walker, both young men, commenced business at Memphis as Walker, Sons & Co. This firm kept an account with the defendant bank, and later with the Bank of Commerce. It was "never very strong" financially, and its business was cotton factorage. Judah was thought by Goldsmith to be a partner, and the plaintiff at one time swore he was a silent partner, but afterwards stated she was informed he was not. He says he was only a salaried manager. The members of the firm were inexperienced, and Judah was, in fact, the almost sole manager of all its affairs—the master spirit of the concern. It is not shown that the young men took any part, except one of them kept the books after Maas had opened them.

The plaintiff, in October, 1880, lent to her son, the firm being also

responsible, $10,000, as his capital in the concern, derived from the life insurance of her husband. Judah also appropriated, or lent to the firm from time to time, sums amounting to over $9,000 from his collections in behalf of plaintiff on the old books. The interest on these sums and on the special deposit funds were remitted by the firm—not always promptly—to the plaintiff at Philadelphia, by exchange or checks; and sometimes the coupons were sent by express to her. When remittances were delayed she wrote or telegraphed the firm. She never communicated with the bank in any way. The remittances were nearly always in letters by her son, and they contained apologies and explanations for delays.

The defendant bank made large advances to the firm, generally by discounts on the security of the firm's "country paper" due from its customers. Judah promised the bank to always protect it as far as in his power, and the relation was very confidential. The bank began to urge him for a reduction of the account, and, not being willing to accommodate him fully, he opened an account with the Bank of Commerce. The Goldsmith note maturing November 1, 1881, he notified Judah that he should not longer need the loan. Maas and Judah say that "a few days" before the note matured, Judah, being unable to continue the loan to Goldsmith, determined to lend the money to Walker, Sons & Co.; and to accomplish that purpose the note of Goldsmith was discounted by the bank, and the proceeds placed to the credit of Walker, Sons & Co. As a fact this discount was as early as July 5th, for there is in the bank's account no discount of that amount, or anything like it, later than that date and prior to December 30th. Possibly, the note was taken as absolute payment without going into the discount account, as there was on October 22d a payment of $6,000 and a discount of $1,500, which Maas says accompanied the Goldsmith note transaction; but I do not see that this is very material, for there is no doubt Judah was being pressed by the bank for money, and that the Goldsmith note was so used.

At the same time Judah urged a loan on the other securities of plaintiff on special deposit, but the bank declined this on the ground that cotton factors' accounts were not desirable to a bank with so small a capital. The securities were above par and abundantly safe for the loan, and it is one of the facts left unexplained by this testimony why the bank would be willing to appropriate the Goldsmith note and refuse to appropriate the other securities. The explanation given that cotton factors' accounts were not desirable is not satisfactory when the money would have gone still further to reduce the indebtedness. It could not have been a fear of the transaction because of plaintiff's rights in the premises, for the Goldsmith note was taken, and the liability to pay back would have been as well risked in one case as the other, the larger amount making no difference, since the money itself would be on hand to pay back, and at least it was no worse off with the whole than a part. I think it a fair inference that the fact was that Judah was unwilling then to appropriate the whole fund to liquidate the old indebtedness of Walker, Sons & Co., and wanted cash in hand for the remaining

securities, which the bank was unwilling to give. He used the collaterals released by the Goldsmith payment to secure a loan through a relative of the other young Walker in New York—that is, I infer this from the circumstances detailed in proof in the Arkansas lawsuit over those collaterals—and was evidently hard pressed and not willing then to sacrifice everything to pay the defendant bank, and it was unwilling to let him have any more money. I call attention to this because I think it explains the transaction and shows that the bank was not then shrinking from a guilty knowledge that Judah was about to commit a breach of trust, or that while it was willing to make a little breach it was not willing to make a big one. The proceeds being in its own hands to meet any demand of the plaintiff in that behalf, there was no sense in refusing to lend the money on that account. The bank did not make the loan because Judah was unwilling to pay the money on the old account. He could get the money at the Bank of Commerce. He told the officers of the defendant bank so, and they delivered the securities to him, fully knowing that he was going to make that use of them. Maas consulted the president and the attorney whether he should deliver the securities to Judah, and they directed him to do so. He had forgotten, however, giving him the receipt and sending it to plaintiff, and neither the president nor the attorney knew that fact Goldsmith, the regular cashier, was absent in New York, but he never knew that fact. Maas never mentioned it because he says he deemed it unimportant at the time and forgot it afterwards. The securities were pledged to the Bank of Commerce, except the People's Insurance stock, which was on the books in plaintiff's name and could not be used by Judah. They were sold by that bank to satisfy the loan, and are lost to plaintiff.

348 The firm of Walker, Sons & Co. soon after failed, disastrously, owing defendant bank a balance of over $5,000, notwithstanding Judah, according to his promise, appropriated to the debt certain stocks of his own and his diamonds. After the failure Kramer, a son-in-law of plaintiff and a lawyer, came to Memphis and presented the receipt, and then the plaintiff learned, for the first time, that the securities had been so used by Judah and the bank. Kramer secured the delivery to himself of certain "country paper" and mortgages to secure notes that were then first taken for the $20,000 lent by plaintiff to the firm, not including, however, the securities in controversy here. An angry lawsuit grew out of this transaction in this family in the courts of Arkansas. A New York gentleman, nephew of the other young Walker, filed a bill stating that the securities belonged to him to secure his guaranty of a loan by the Traders' & Importers' Bank of New York to the firm for some $26,000, and that he had sent them to the firm for collection, and that they were, by the plaintiff's son, and without consent of the other Walker or Judah, turned over to his own mother; all of which was denied, and the averment made that this scheme was trumped up to defeat plaintiff of her advantage and enable Judah to continue business on the assets at Indian Bay, Arkansas. These facts are stated to show the course of dealing in this family with

each other, relied on to strengthen Judah's authority over the particular funds in controversy in this suit.

L. & E. Lehman and Metcalf & Walker, for plaintiff; T. B. Turley, for defendant.

HAMMOND, *J.*:

As counsel for the plaintiff well remarks, so far as the $5,000 collected by the defendant bank on the Goldsmith note are concerned, this is not a question of negligence, but one of title. The bank knew that the plaintiff was the owner of that fund, and while it may be conceded that, under the circumstances of the deposit, it could safely have redelivered the note and its collateral security to Judah, or might safely have paid him the money without gross or other negligence, it did neither of these things. By authority of Judah, the plaintiff's agent, it converted the fund to its own use by paying the debt of another to itself. This was so significant an act of its own and of the agent that, knowing the plaintiff's title, the bank should have required specific authority from the plaintiff to justify that use of her funds by her agent and itself, and it could not be at all implied from the relation of Judah to the plaintiff and this fund. It was in no sense an investment, as Judah pretends it was; and the bank knew it was not. None knew the weak condition of Walker, Sons & Co. better than the bank, and this was a desperate effort to save a part of its advances to that firm upon inadequate security, and nothing but a deliberate attempt by Maas, the acting cashier, and Judah, two intimate friends, to carry out the confidential arrangement, that Judah would, at all hazards, protect the bank, and which he afterwards further attempted to do by a pledge and appropriation of his individual securities, including even his personal diamonds.

But had the firm of Walker, Sons & Co. been never so solvent it would have been none the less a conversion by the bank. It is no answer to this to say that Judah had full control of the fund; that he had created it, so to speak; that he had used it with the same full power that he had used his own funds and dealt with it in all respects as if he were its owner. As a matter of fact he was not its owner, and the bank knew full well precisely who the owner was, where she resided, and that a letter or telegram would speedily develop whether or not her agent was authorized to use her money to pay the bank a debt due from a firm in such failing circumstances that the bank was no longer willing to trust it, no longer desired its account, and was unwilling to lend it money upon securities purchased by it for this agent and known to be ample security for the loan asked. Implied authority will not do to support such a transaction as that, where the principal is known, and the bank, relying on the implication, receives the benefit for itself. The temptation to indulge in weak implications for one's own benefit is natural; but where the truth can be so readily learned no implication should prevail to sustain so plain a breach of trust as this was on the part of a special depositary. I am inclined to think that, apart from the relation of depositary, if Judah had come to this bank, it being an entire stranger

to all these transactions, and pledged to it the Goldsmith note to secure or pay the Walker, Sons & Co. debt, first relating to the officers all the facts exactly as we have them in this case, and submitting to them the risk of deciding whether he was sufficiently authorized to make the pledge, the plaintiff could recover, because the want of authority would be apparent from the facts. The question is not to be tested by Judah's opinion of his authority as a derivative fact, nor of the bank's opinion of that authority as a derivative fact; but would any reasonable mind conclude from the circumstances that Judah was authorized to do this particular thing? If he had presented a written power of attorney authorizing him to do all he claims to have had the power to do, and he had construed it to authorize this act, it would have been a fatal misconstruction. He was to invest the fund and make it earn interest for her benefit; he had invested this particular fund in a safe security, and it was earning interest; he took the security and pledged it for the debt of another than the owner, taking no security in return, not even the note of that other, with no stipulation as to time of the loan, none as to the rate of interest or time when due, and without a single element of investment in the transaction. Changing the investment would have been an entirely different transaction, and the very necessity that was upon him to convert this fund and the other securities on deposit with the bank was fully known to it, and precludes all idea of any belief that this use of the Goldsmith note was a *bona-fide* investment for her benefit. It was the simple conversion of the fund to another's use. Now, it is true that other was the plaintiff's son, who was one of the firm—and this was a find of family firm—but the plaintiff was not a member of it, and was in no way liable to make good its debts to this bank. It is true, she had lent the firm some $20,000 of her other funds; that about one-half of this loan was derived from the same source as the fund in controversy here; and that as to that half she had never given any special directions or authority to lend it to the firm, and it was so lent upon Judah's own responsibility as her agent. It is also true that she seems to have made no complaint of that conduct, but it is equally true that she was fully advised of the investments on special deposit in the defendant bank; that, for some reason, Judah desired a receipt showing the deposit; that it was sent to her, and she set store by it, and that the firm promised to send on the bonds and place them in her own custody. As long as they sent her the coupons, or otherwise remitted the interest, however tardily, she permitted the special deposit to remain with her agent. But it does not follow from all this that she was willing to lend this firm any more money and to turn over this special deposit for their benefit. The implications were rather to the contrary, and especially if she were as fully aware of the firm's weakness as was this bank, and the bank cannot presume upon her ignorance. Besides, the bank knew that Judah was the agent of the firm—the cashier thought he was a member of it, as did almost every one, though he denies this—its master and manager. This should have made the bank more careful in drawing inferences of authority for its own benefit. Its title can be no better than Judah's. It was in no sense an innocent purchaser of the note with-

out notice of the plaintiff's title. It right depends wholly on Judah's actual authority to so apply the proceeds, and not on any protection through his appearance of authority. Knowing the rightful owner, it could derive no title, except from that owner directly, or through a duly authorized agent to transfer it, and Judah was not in fact such an agent.

349 Altogether, I have not the least doubt that the bank is liable for the amount of the Goldsmith note, and interest from the date of its collection, not so much because of any gross negligence, as because it has collected her money and has never paid it to her, and without due authority appropriated it to its own use by paying the debt due to it from another. I do not think any dishonesty is to be imputed to the bank in the transaction. It is difficult to resist the conviction, on the facts of this case, that point to something behind what has been really disclosed, that this family were trying to build on the remnants of the assets of the old family firm that had been withheld from creditors of that firm a new business; that everything was risked for their mutual benefit, and that the plaintiff is trying to retrieve her losses from bad management, and to save from the wreck by setting up technical rights, rather than moral obligations, to herself. Maas, the acting cashier, was familiar and intimately connected with all this, and relied, perhaps, too much on the fidelity of the family to each other. Still, the contract of bailment is one of strict right, and the defense has not been projected on the line suggested, of showing that in fact this family conspired together to conceal from the creditors of the old and new firms that which, it may be, rightfully belonged to them, if the full facts were known, by putting the family moneys into such technical shape that if business prospered the men could use the funds, but if disaster came the women could claim them as their own. There was a suggestion of such defense in the argument, and I doubt not it satisfies the consciences of both Judah and Maas; but the court can decide only according to the technical attitude in which the parties have placed the defense, and not on that which is left to mere inference, however strong that may be. "For misappropriation of the thing bailed to him, even the bailee without reward makes himself strictly answerable. His attempts to sell, pledge, or give away the thing, or otherwise assume to act as the owner thereof, would be downright dishonesty, and amount to conversion. It is an argument for the good sense and fidelity of parties thus intrusted that our reports shed but little light on these points." Schouler, Bailm., 62; Story, Bailm., § 102, last clause; and see Duncan *v.* Jaudon, 15 Wall., 165; Alexander *v.* Alderson, 7 Baxt., 403.

I am not so entirely clear as to the bonds converted through a pledge of them to the Bank of Commerce, but I think the defendant bank can only be held for that conversion on the principle that a gratuitous bailee of an agent or trustee becomes the guarantor of that agent's good faith in his subsequent dealings with the property, and that if this gratuitous bailee has knowledge of the fact that the agent contemplates the pledge of the securities for a particular purpose, he may withhold a redelivery to his own bailor unless he has a care

that the purpose falls within the scope of the bailor's own agency. Aside from the receipt, to be directly considered, there can be no doubt that Judah was the bailor and the bank's obligation as bailee was to him. The fact that he was an agent and that the bailee knew the principal and all about the agency does not alter its relations to the bailor. It was not and did not by the bailment become a joint trustee or agent with Judah. Judah was its *cestui que trust*, so far as it was a trustee for any one. Accountability to him for the bailment was the full measure of its duty, and it might, without the least imputation of negligence, redeliver to him from whom it received the property. Any other rule than this would deprive all agents of a safe deposit for the property belonging to the agency; for no bank or other depositary could at all afford to become the insurer of the fidelity of every agent who made special deposits with it. No case that has been cited holds such a doctrine. The bailee cannot profit by becoming a joint breaker of the trust; and what we have already said about the Goldsmith note illustrates the stringency of that rule. But does the mere knowledge of the fact that one who is agent contemplates a certain use of the funds constitute the bailee a joint participant in a breach of trust, if by that act one occurs? Should a bailee from the agent having that knowledge meddle in the affair and withhold the property which he has promised to redeliver to that agent? How far must this scrutiny go, and on what kind of evidence should the bailee act in withholding the property? And does he act at the peril of liability both to the agent and the principal for a wrong decision? Furthermore, if he must so act because he has that knowledge, when he is without actual knowledge of any contemplated use, why should he not be put to the obligation of making inquiry? These questions indicate that if the principle be correct, it virtually converts every depositary into a plenary trustee and transfers the agency at once to the bailee. The bailee is indisputably in a narrow sense a trustee for the agent's principal, but more largely for the agent himself; and as to neither is he a trustee in other than the limited sense that every custodian is a trustee, though we are apt to press this notion that he is a trustee beyond its proper scope. Mr. Pomeroy has wisely called attention to the danger of doing this in all cases of implied trusts. 2 Pom. Eq., § 1044, and notes. We have only to read Mr. Justice Story's commentary on the point to see how far the doctrine contended for here goes beyond anything he conceived in relation to it. The original doctrine that this bank could only have delivered to Judah, the agent, and not at all to his principal, has been broken down, indeed, and now the delivery may be always to the true owner; but he does not hint at the doctrine that there can be no delivery to the agent who made the deposit without some special authority of the principal. Story, Bailm., §§ 102–108; The Idaho, 93 U. S., 575,, 579.

If a trustee be bailor it is only when the trust ceases that the bailee must deliver to the rightful *cestui que trust*. Story, Bailm., § 109. He must also regard any other revocation of authority that comes to his notice, but I find no case that holds a bailee when he delivers to his immediate bailor without some notice of the revocation of the

bailor's own agency. Schouler, Bailm., 69. None of the cases cited by counsel, either as adjudications or in principle, can be held to charge the bank here further than the Goldsmith note. I shall not extend this opinion by a review of them to show this, but leave that to the critical examination of the reader. Duncan *v.* Jaudon, *supra*; First Nat. Bank *v.* Graham, 100 U. S., 699; S. C. 79 Pa. St., 106; Smith *v.* Ayer, 101 U. S., 320; National Bank *v.* Insurance Co., 104 U. S., 54; Colyer *v.* Taylor, 1 Cold., 372; Alexander *v.* Alderson, *supra*; Treadwell *v.* McKeon, 7 Baxt., 403; Parker *v.* Gilliam, 10 Yerg., 394; United Society of Shakers *v.* Underwood, 11 Bush., 265; S. C. 13 Amer. Law Reg., 211, and note; Shaw *v.* Spencer, 100 Mass., 389; Loring *v.* Brodie, 134 Mass., 453; Bundy *v.* Montecello, 84 Mass., 119; and see Mechanics' Bank *v.* Bank of Columbia, 5 Wheat., 326, 337; Scott *v.* National Bank, 72 Pa. St., 471: Chattahooche Bank *v.* Schley, 58 Ga., 369; Smith *v.* National Bank, 99 Mass., 605; Foster *v.* Essex Bank, 17 Mass., 479; Whitney *v.* National Bank, 55 Vt., 154. These cases fully recognize the doctrine that any one, whether a bailee or a third person, who joins with a trustee in a breach of trust for his own profit, or purchases with notice of the true owner's rights, is liable to that owner; but they go no further than this, and do not establish that mere knowledge that the agent is about to pledge the securities to another for a particular purpose, without profit of its own in the transaction, is a basis for such liability, and the claim here must depend entirely upon the right of this bank to redeliver these securities to Judah, who placed them on deposit. To paraphrase the language of Turton *v.* Dufief, 6 Wall., 420, we are asked to hold that the bank, which did the plaintiff's agent the kindness to keep safely for him the securities she had placed in his hands for management, should have anticipated his breach of trust, and intervened to prevent it by denying his right to retake a possession which the bank had taken from him. A bailee without hire, as by a special deposit, is unquestionably in some degree less bound to look after the conduct of a fiduciary bailor than a banker having a general deposit for a like trustee. The circumstances under which a liability like that claimed here will arise against the latter are stated in Gray *v.* Johnston, 3 H. L., 1, and attention is there called to an important element in the consideration of such cases, which is: that a banker cannot question the right of his customer by refusing to honor his demands by check or otherwise upon any theory that it is the banker's duty to look after the appropriation of the trust funds when withdrawn from the bank and to protect the trust by setting up a *jus tertii* against the
350 demand. This case goes further than any I have found, in some of its expressions, to justify the contention that mere knowledge of the banker that a breach of trust is intended makes him privy to it and liable. But, on scrutinizing the cases there cited, it will be found that participation in the profits of the fraud is, generally speaking, an element in the case; and a "mere reason to believe that the trustees were misapplying the assets" will not make the banker liable; for "this would be to make every trustee accountable for his conduct in the trust to every agent whom he happened to employ, and would carry the principle of constructive trust to an

inconvenient and, indeed, to an impracticable length." Keane *v.* Roberts, 4 Madd., 356. And in this case itself it is said:

"Supposing, therefore, that the banker becomes incidentally aware that the customer, being in a fiduciary or representative capacity, meditates a breach of trust, and draws a check for that purpose, the banker, not being interested in the transaction, has no right to refuse payment of the check; for, if he did so, he would be making himself a party to an inquiry as between his customer and third persons. He would be setting up a supposed *jus tertii* as a reason why he should not perform his own distinct obligation to his customer." Gray *v.* Johnston, *supra*, 14.

These reasons apply with a greater force to a mere special deposit. Treflts *v.* Canelli, 4 P. C., 277; Giblin *v.* McMullin, 2 P. C., 317; Davies *v.* Sadler, 19 Ch. Div., 86.

At all events the bailee must know that the contemplated appropriation is a breach of trust, not merely that a certain transaction is about to be consummated, which may or may not be a breach of trust, according to circumstances unknown to him. This is clearly established by the cases. Now, how did this bank know that Judah did not have authority from the plaintiff to lend this money to her son's firm, as he had lent other money to that firm out of this same fund? I have held that this would not serve as a defense where the bank got the benefit, as in the matter of the Goldsmith note, because there it was a question of title, and the right depended on the actual fact of authority, express or implied. But on this point it works the other way, and it is a question of negligence or guilty knowledge of Judah's want of authority; not whether the authority existed in fact, but whether the bank knew it did not exist. The bank did not know when it redelivered the securities to the same custody from which it obtained them what we now know, after careful examination of witnesses and critical scrutiny into the force and effect of admitted circumstances, that Judah had no express authority, and, as a matter of law, none could be fairly implied from his previous dealings with the firm. How could the bank say Judah had no authority when it had no right to make an inquiry into it? He did, presumptively, have authority, and the bank might assume that so full an agant as he was or had been was acting within the scope of his authority, just as one may assume that an executor is in the discharge of his office and not acting beyond it. The negligence was on the part of the plaintiff. She swears she did not trust Judah, and had no confidence in him, while all the time before she had trusted him, in fact, by leaving this large fund in his entire control. She made no reply to the letter she got from the bank—if she received it from that source—from November 27, 1880, to the date of Kramer's visit in December, 1882. She did not write to terminate Judah's agency, and gave no directions not to redeliver to him, nor did she take any significant act in that direction, but, on the contrary, always communicated by letter and telegram about the interest with her son's firm, or with Judah, which was about the same thing, as this record shows that he was the real manager of the firm's business.

Unless, then, there is something in the receipt given by the bank, or in the circumstances attending it, to change the relation of Judah to the fund and to the bank, she cannot recover. I think the effect of that receipt has been greatly exaggerated, and that the use of it made by the plaintiff is an afterthought. It is in form a receipt to Judah, and not to the plaintiff. Nothing was further from Judah's intention than by that act to terminate his control over the securities. The bank had no such intention. The plaintiff had not by word or line indicated any intention to do that thing, so far, at least, as the bank knew, and that is the point of our inquiry. She never communicated with the bank, and always with others, about the interest, and this for more than a year before the redelivery to Judah. The circumstance of Judah coming into the bank and asking for a receipt to be sent to her, and having the bank inclose it to her, was entirely consistent with his continued agency. I think it altogether probable, as the letter is not produced, that Maas merely inclosed it at Judah's direction in the envelope of the bank, and without any letter, unless from Judah, or at the most only with his own note to that effect, for it did not go through the regular routine of being signed by Goldsmith, the cashier, and copied on the letter-press book, as would have been done if it had been the formal transaction of the bank. I think the plaintiff did not by these circumstances become the bank's bailor to the exclusion of Judah, and naturally the bank continued to recognize Judah's agency, as it had done for a long time before; and, as between her and the bank, there is no reason for imposing the loss by her own neglect on the bank. She trusted Judah and not the bank; or if she relied on the bank to protect her she failed in any way to notify it of that fact. The receipt does not promise that the bank shall deliver to its holder, or contain any words to that effect, as some have done in the cases examined. It was not usual to give certificates of special deposit in this bank, and this is hardly a certificate at all, and contains none of the *indicia* of negotiable or assignable deposit receipts intended to be used to secure or transfer title. It does not say that Mrs. Walker has deposited the securities through or by her agent, but that "G. H. Judah, Esq., agent for Mrs. Eliza Walker, of Philadelphia, has placed with us on special deposit," etc. The coupons of the bonds were payable in New York, and, altogether, if Mrs. Walker wished to discharge Judah, naturally she would have taken these securities into her own custody. Why should she keep them at Memphis? Plainly, they had been always under Judah's control, as the funds were from which they were derived, and the idea of treating this receipt as a change in his attitude towards the fund, and a change of the bank's attitude towards it, is resorted to in the hope of throwing the loss by her own neglect on the bank.

There is no satisfactory proof that the bank got $1,000 of the proceeds of the bonds. It may have done so, but it is not certain. The check on the Bank of Commerce, paid to defendant bank, was paid February 14, 1882. The discount on the pledge of the securities was on the 21st, and we know that a part of the bonds were, in fact, in New York until the 24th. Judah was largely overchecked with the Bank of Commerce when the discount was made, and the identical

money realized by the discount may or may not have gone to pay this particular check; but as the overcheck was $5,800, and the discount was only $5,091.38, some part of the overcheck certainly was paid from other sources. We cannot undertake to say that a part of the proceeds has been satisfactorily traced to the defendant bank.

Decree according to this opinion.

351 THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Western District of Tennessee:

I, Bell W. Etheridge, clerk of the circuit court of the United States for said western district of Tennessee, do hereby certify that the papers hereto attached are full, true, perfect, and correct copies of the original record and proceedings in said court as the same now appear of record and upon the files in my office, in the following cause, to wit:

ELIZA WALKER
vs.
THE MANHATTAN BANK OF MEMPHIS, TENNESSEE. } No. 384.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this 14th day of November, A. D. 1885, and of the Independence of the United States the 101st year.

[Seal of the Circuit Court of the United States for the District of West Tennessee.]

BELL W. ETHERIDGE, *Clerk.*
W. B. WEISIGER, *D. C.*

[Endorsed:] No. 384. Eq. Circuit court of the United States, western district of Tennessee. Eliza Walker *vs.* Manhattan Bank of Memphis, Tennessee.

Endorsed on cover: W. Tennessee C. C. U. S. No. 1219. The Manhattan Bank of Memphis, Tennessee, appellant, *vs.* Eliza Walker. Filed November 17, 1885.

352 *Final Decree.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its May Term, A. D. 1885, at the United States courthouse, in the city of Memphis, in said district, on, to wit, the second day of October, A. D. 1885, in the following cause, to wit:

ELIZA WALKER, Plaintiff,
vs.
MANHATTAN BANK OF MEMPHIS, Defendant. } No. 384.

This cause came on to be further heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows:

1. That the complainant, Eliza Walker, is entitled to recover of the defendant, the Manhattan Bank of Memphis, the sum of five thousand dollars, with interest thereon from the date of its maturity, to wit, the first day of November, 1881, being the amount of the note of E. Goldsmith, mentioned in the original bill herein, which the defendant collected and appropriated to its own use.

353 2. That the defendant is not liable to the complainant for any of the other items mentioned in the bill, besides said promissory note, and that as to said other items complainant is entitled to no relief.

3. Wherefore it is ordered, adjudged, and decreed that the complainant recover of the defendant five thousand dollars and eleven hundred and seventy-five dollars, the interest thereon from the first day of November, 1881, making, in the aggregate, six thousand one hundred and seventy-five dollars, for all of which let execution issue as at law; and that neither party shall recover costs of the other. All of which is finally ordered, adjudged, and decreed in this cause.

354 *Decree Allowing Plaintiff's Appeal.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November Term, A. D. 1886, at the United States

court-house, in the city of Memphis, in said district, on, to wit, the 13th day of January, A. D. 1887, in the following cause, to wit:

ELIZA WALKER, Plaintiff,
vs.
MANHATTAN BANK OF MEMPHIS, Defendants. } No. 384.

In the above-named cause came this day the complainant and in open court prayed an appeal to the Supreme Court of the United States from so much of the decree entered therein on the second day of October, 1885, as is adverse to her in refusing her relief touching certain items mentioned in her bill of complaint; and said complainant having given bond in the sum of five hundred dollars, as required by law, which is approved by the court, said appeal is granted; and the defendant being present in open court by its attorney, Thomas B. Turley, Esquire, waives issuance and service of citation.

355 *Appeal Bond.*

ELIZA WALKER, Complainant,
vs.
THE MANHATTAN BANK OF MEMPHIS. } 384.

Know all men by these presents, that we, Eliza Walker, as principal, and Leopold Lehman, as surety, are held and firmly bound unto the Manhattan Bank of Memphis, Tennessee, in the sum of five hundred dollars, to be paid to the said Manhattan Bank of Memphis, to which payment well and truly to be made we bind ourselves jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, signed and dated at Memphis, Tennessee, this 13th day of January, A. D. 1887.

The condition of this obligation is such that whereas the above-named Eliza Walker has prosecuted her appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action on October second, A. D. 1885, by the circuit court of the United States for the western district of Tennessee, at Memphis, so far as the same is adverse to her in refusing her relief touching certain items in her bill of complaint in said cause:

Now, therefore, the condition of this obligation is such that if the above-named Eliza Walker shall prosecute her said appeal to effect and answer all costs if she shall fail to make good her plea, then this obligation shall be void; otherwise, remain in full force and virtue.

ELIZA WALKER, (SEAL.)
By L. LEHMAN, *her Att'y.* (SEAL.)
L. LEHMAN. (SEAL.)

356 Acknowledged before me, at Memphis, Tennessee, this 13th day of January, A. D. 1887.

JOHN B. CLOUGH,
Clerk of said Circuit Court.

MEMPHIS, TENNESSEE, *January 13th*, 1887.

I hereby approve this bond and certify that the surety, Leopold Lehman, is good and sufficient security for the penalty thereof.

E. S. HAMMOND,
District Judge for said Western District of Tennessee.

Filed January 13th, 1887.

JOHN B. CLOUGH, *Clerk.*

357 THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Western District of Tennessee.

I, as the clerk of the circuit court of the United States for said western district of Tennessee, do hereby certify that the papers hereto attached are a full, true, perfect, and correct copy of the originals, to wit: the final decree of October 2, 1885; the decree of January 13, 1887, allowing plaintiff's appeal and her appeal bond in said court as the same now appears of record and upon the files in my office in the following cause, to wit,

ELIZA WALKER
vs.
THE MANHATTAN BANK OF MEMPHIS, TENNESSEE, } No. 384,

and constitute all the matters of record in said cause had therein since and subsequent to the appeal therein of the defendant, the Manhattan Bank of Memphis, Tennessee.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, Tennessee, this 13th day of January, A. D. 1887, and of the Independence of the United States the 111th year.

[Seal of the Circuit Court of the United States for the District of West Tennessee.]

JOHN B. CLOUGH, *Clerk.*
W. B. WEISIGER, *D. C.*

Certificate of Clerk.

Circuit Court of the United States, Western District of Tennessee.

ELIZA WALKER
vs.
MANHATTAN BANK. } No. 384.

In this cause, lately pending in said circuit court of the United States, at Memphis, Tennessee, and, on appeal therefrom by both sides, now pending in the Supreme Court of the United States, at Washington, D. C., being for the October term, 1887, Nos. 481 and 1029, I, as clerk of the said circuit court of the United States, do hereby certify that the original Exhibit C to Goldsmith's deposition taken in said cause contains, among other endorsements, the following one which does not appear in the "transcript of record," on pages 87 or 88, where said Exhibit C is printed in the transcript, viz:

"600 b'l'd'g stock."
"1,000 B'k of Com."

In witness of this certificate I hereto subscribe my name and affix the seal of said circuit court of the United States, at my office in Memphis, Tennessee, this ninth day of January, anno Domini 1889.

{ Seal of the Circuit Court of the United States for the District of West Tennessee. }

JOHN B. CLOUGH,
Clerk of said Circuit Court.

Supreme Court of the United States. October Term, 1888.

MANHATTAN BANK
v.
ELIZA WALKER.
ELIZA WALKER
v.
MANHATTAN BANK. } Nos. 205 and 682.

Appeal and cross-appeal.

It is agreed that the foregoing certificate may be filed as part of the record of the above cause, now pending on appeal and cross-appeal in the Supreme Court of the United States, with the same effect as if a suggestion of diminution of the record had been made and said certificate had been returned in response to a writ of certiorari.

S. P. WALKER,
For Eliza Walker.
T. B. GURLEY,
For Manhattan B'k.

[Endorsed:] Nos. 205, 682. Circuit court of the United States, western district of Tennessee. Eliza Walker *vs.* Manhattan Bank. Certificate of clerk of the circuit court.

[Endorsed:] Sup. Court U. S. 1888, Octo. term. Nos. 205 & 682. The Manhattan Bank of Memphis, Tenn., app't, *vs.* Eliza Walker and Eliza Walker, app't, *vs.* The Manhattan Bank of Memphis, Tenn. Stipulation and addition to record.

[Stamped:] Office Supreme Court U. S. Filed Jan. 30, 1889. James H. McKenney, clerk.

JAN 30 1889
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

October Term, 1888.

NOS. 205 AND 682, APPEAL AND CROSS-APPEAL.

ELIZA WALKER

VS.

THE MANHATTAN BANK.

BRIEF FOR COMPLAINANT.

L. & E. LEHMAN,
METCALF & WALKER,
OF COUNSEL.

E. Whitmore, Printer, Memphis, Tenn.

[Endorsed:] Nos. 205, 682. Circuit court of the United States, western district of Tennessee. Eliza Walker *vs.* Manhattan Bank. Certificate of clerk of the circuit court.

[Endorsed:] Sup. Court U. S. 1888, Octo. term. Nos. 205 & 682. The Manhattan Bank of Memphis, Tenn., app't, *vs.* Eliza Walker and Eliza Walker, app't, *vs.* The Manhattan Bank of Memphis, Tenn. Stipulation and addition to record.

[Stamped:] Office Supreme Court U. S. Filed Jan. 30, 1889. James H. McKenney, clerk.

FILED
JAN 30 1889
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

October Term, 1888.

NOS. 205 AND 682, APPEAL AND CROSS-APPEAL.

ELIZA WALKER

VS.

THE MANHATTAN BANK.

BRIEF FOR COMPLAINANT.

L. & E. LEHMAN,
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[Endorsed

SUPREME COURT OF THE UNITED STATES,

October Term, 1888.

NOS. 205 AND 682, APPEAL AND CROSS-APPEAL.

ELIZA WALKER

VS.

THE MANHATTAN BANK.

BRIEF FOR COMPLAINANT.

STATEMENT.

The bi l was filed by the plaintiff, a citizen of Pennsylvania, against the defendant bank, a citizen of the State of Tennessee, alleging that plaintiff, through one G. H. Judah, had on the 27th of November, 1880, made a special deposit in said bank, of certain notes, bonds and stock, and had taken a certificate of deposit therefor in form following, viz:

"G. H. Judah, Esq., agent for Mrs. Eliza Walker, of "Philadelphia, has placed with us on special deposit:

"$3,000, Memphis and Charleston Railroad Second "Mortgage Bonds.

"$2,200, Mississippi Central Railroad Second Mortgage "Bonds.

"$1,100, People's Insurance Company Stock.

"$5,000, Note, E. G. and collateral attached, $6,000, M. Bank Stock.

"$325, Interest Notes (4, at $81 25)."

And that said bank, after due demand, had failed to

account for the same, or to discharge itself from its liability as bailee of said securities.

The facts are quite fully stated in the findings of fact by the Court below:

Transcript, 113-117.

And we shall advert to the evidence only when we insist upon propositions of fact not expressly found by the Trial Court, or at variance with such findings, or with the contentions of adversary counsel.

The decree of the Court below charged the bank with the Goldsmith note for $5,000, and interest thereon, but refused to hold it liable for the $5,200 of bonds.

Both parties have appealed. It is conceded that the smaller Goldsmith notes were paid, and that the People's Insurance Stock was delivered to the complainant before the bill was filed. They are not in controversy. The bank denies any liability whatever. The complainant submits that it should have been held liable for the $5,200, of bonds as well as the $5,000 note.

It is conceded that shortly before the maturity of that note the bank, at the instance of G. H. Judah, discounted the note of Walker, Sons, & Co. for $6,500, and, as security for the payment of that note, Judah endorsed to it the Goldsmith note, which note, at maturity, was paid to the bank. It has never accounted to the complainant for the money. By virtue of Judah's endorsement, it claimed to be the owner of the note, collected it as owner, and treats the proceeds as belonging to it. When the $6,500 note of Walker, Sons & Co. was discounted by the bank, the proceeds were not paid over to Judah, or to Walker, Sons & Co., except to the amount of $500, less the discount. $6,000 of the proceeds were applied to the payment of an antecedently existing debt from Walker, Sons & Co. to the Bank.

There is not the slightest controversy about these facts.

Maas' depo., ans. 24, *page* 44.

The note having been paid to the bank, and the fund still being in its possession, it is clear that the question between

complainant aud the bank is simply one of title to the fund. The note did belong to her, confessedly; and the bank has undertaken, by Judah's authority, first, to accept it as collateral to a note of Walker, Sons & Co., and, finally, to apply its proceeds, when collected, to the payment of that note, which, to the extent of $6,000, was given for an antecedent debt. This, as well as the subsequent transaction, by which the complainant lost her $5,200 of bonds, was conducted wholly through the agency of G. H. Judah.

There is proof in the record strongly tending to establish, if not actually establishing, that *Judah was a partner in the firm of Walker, Sons & Co.*

The two nominal members of the firm, E. L. and Lee B. Walker were his nephews, and young men without business experience; and that Judah had absolute control of the business of the firm—was, as the Circuit Judge expressed it, "its master spirit"—is undoubted.

Dep. of Maas, ans. to cross-inters 67 *to* 71. *Transcript* 52.

Goldsmith, the cashier of the bank, testifies that he thought he was a partner.

Dep. of Goldsmith, ans. to cross-inters. 19 *and* 20. *Transcript* 79.

He treated himself as liable for its debts, signing its checks, and pledging his personal stock and diamonds to secure its debt to the bank.

Dep. of Judah, ans. to cross-inter. 33 *to* 40. *Transcript* 95.

Defendant bank read in evidence the deposition of Kramer, given in a suit then pending at Helena, Arkansas, in which the witness testifies that Judah was a partner.

And the Complainant in the same suit stated that he was a partner.

Ans. to int. 5. *Transcript* 95.

Transcript 98.

Judah alone denies it, and his relations to the transactions robs that denial of any force. His deposition throughout exhibits a determined purpose to suppress every fact that would tend to fix a liability on the bank; for the same facts which charge the bank with liability fix upon him a flagrant breach of

trust. The gravamen of the complainant's case is that Judah and the bank confederated unlawfully to convert her securities to the use of the Bank and of Walker, Sons & Co. Judah's denial, therefore, in behalf of the bank is a denial in his own behalf, and amounts to little, in view of the admitted facts of the case.

We submit that the fact of partnership is established; but whether it is or not, the fact is not controverted that Judah had complete control of the firm's business. Goldsmith, the cashier of the bank; Maas, its assistant cashier, and Judah all so testify.

Dep. of Goldsmith, ans. to cross-inters. 19 *and* 20. *Transcript* 79.

Dep. of Maas, ans. to cross-inter. 40. *Transcript* 50.

Dep. of Judah, ans. to cross-inter. 22. *Transcript* 22.

Maas, the assistant cashier of the Bank, but acting cashier throughout the period of the matters here in question, was, before his connection with the bank, confidential book-keeper of the firm of Walker Bros. & Co. (of which Judah was a member), and was on terms of the closest personal intimacy with Judah.

When the book accounts of Walker Bros. were sold Maas bought them in for complainant and her sister, Mrs. Sarah Walker. The funds realized from that purchase were in part kept in his name in the defendant bank. He (Maas), at the instance of Judah, opened the books of Walker, Sons & Co.

Dep. of Maas, ans. to cross-inters 41 *and* 42. *Transcript* 50.

Judah promised him that he would certainly protect the Bank in case of disaster.

Dep. of Judah, ans. to cross-inters. 30, 32 *and* 104. *Transcript* 23, 24 *and* 29.

At the date of the conversion of the Goldsmith note, the firm of Walker, Sons & Co. must have been insolvent. It failed disastrously in January, 1883, owing $60,000, and has not since paid a single dollar to its general creditors.

Dep. of Judah, ans. to cross-inters. 24 *to* 27. *Transcript* 23.

Before the conversion of the Railroad Bonds—how long before does not appear—Judah had pledged to the defendant

certain ~~bank~~ Building and Loan stock belonging to himself, for the debt of Walker, Sons & Co.

Dep of Judah, ans. to cross intintgs. 24 *to* 27. *Transcript* 23.

He was pressed to pay or reduce the firm's debt to the Bank. Maas, being cashier in the bank in which the firm kept its account, must have known, and confesses that he did know that the firm had no available funds.

Dep. of Maas, ans. to cross-inter. 74. *Transcript* 52.

The fact that he resorted to the desperate expedient of co-operating in the conversion of this trust fund to reduce the debt of the firm to the bank is evidence enough of the insolvency of that firm, and of Maas' knowledge of that fact. The bank itself, at the time of the conversion of the bonds, held the demand note of the firm for $13,500.

Transcript 87.

The Bank had, itself, at the time of its execution, mailed the certificate of deposit to the complainant, to whom, as stated on the face of that certificate, the securities belonged; and the two transactions by which the Goldsmith note and $5,200 of Railroad Bonds were converted by Judah and the Bank, were made without any redelivery of the certificate, leaving it outstanding in complainant's hands.

ASSIGNMENT OF ERRORS.

1. The Court below erred in decreeing that the defendant bank had rightful power to deliver the $5,200 of railroad bonds to Judah or to the Bank of Commerce. The defendant bank should have been decreed to account for the value of said bonds, at the time of the delivery to Judah or to the Bank of Commerce, or for the highest value thereof from that date down to the date of hearing.

2. It erred in its finding of fact that no part of the proceeds of the loan by the Bank of Commerce were received by the defendant bank. It should have found that $1,000 was so received.

3. It erred in holding that there was no contract of bailment between complainant and defendant bank.

4. It erred in holding that Judah's agency and power over the *corpus* of the securities described in the certificate of deposit of November 27th, 1880, continued after the execution of that certificate. It should have held that his agency ceased with the execution of the certificate; or, that if it continued at all, it was confined to the collection and forwarding of the interest on the securities.

BRIEF.

I.

The defendant bank, as a corporation, assumed the obligations of a bailee, by receiving the complainant's securities on special deposit.

National Bank vs. Graham, 100 *U. S* 699.

Foster vs. Essex Bank, 17 *Mass*, 479.

II.

The execution of the certificate of deposit, and its transmission by mail to the complainant, created the relation of bailor and bailee between complainant and the bank, and the sole question is of the liability of the defendant bank, because of a misdelivery of the securities. The securities not having been lost by fire, theft or otherwise, but having been delivered to Judah or to the Bank of Commerce, on his order, the case must turn on the express or implied authority of Judah to withdraw them, or to direct the delivery to the Bank of Commerce, and not on a question of negligence.

Story on Bailm, § 106, 414.

Colyar vs. Taylor, 1 *Col.*, 372.

Stewart vs. Frazier, 5 *Ala.*, 114.

Jones vs. Greenwood, 20 *La.*, 297.

Honig vs. Pacific Bk., 73 *Cal.*, 464.

III.

Judah had no agency in respect of and no power over these securities after the execution of the certificate of deposit, and its transmission to complainant.

If he had any power it was confined to the collection and forwarding of the interest earned by the securities, which would not confer or imply a power over the *corpus* of the securities.

Transcript, pp. 34, 35, 55, 68 *and* 73.

Chattahooche Bk. vs. Schley, 58 *Ga.*, 369.

IV.

Upon the broadest powers of a trustee, in Judah, to sell the securities, reinvest the proceeds, etc., there would be no implied power to pledge them.

Loving vs. Brodie. 134 *Mass.* 453.

And still less a power to pledge for an antecedent debt of, or for a present loan of money to Walker, Sons & Co. Judah being a partner in that firm, or its general business manager, the bank was bound at its peril, to see that he had power to convert the securities to its use, and is liable for their value, in the absence of actual power to do that exact thing.

Duncan vs. Joudan, 15 *Wall.*, 165.

Smith vs. Ayer, 101 *U. S.*, 320.

Nat'l Bk. vs. Ins. Co., 104 *U. S.*, 54.

Shaw vs. Spencer, 100 *Mass.*, 389.

V.

The Goldsmith note was converted to the use of, and its proceeds are yet held by the bank, making it liable to account therefor

Schouter on Bailm, 62.

Story on Bailm, § 102.

Alexander vs. Alderson, 7 *Baxt.*, 403.

Osborn vs. Bank of U. S., 9 *Wheat,* 738

And it is liable for the $5,200 of bonds, because it not only actively aided and co-operated in an unlawful conversion of them by Judah, with full knowledge of his purposes, but itself

received, and yet retains a portion of the fruits of that conversion.

Parker vs. Gilliam, 10 *Yerg.*, 394.

ARGUMENT.

Under the facts stated, we submit that the liability of the bank, both for the $5,000 Goldsmith note and the $5,200 of bonds cannot be successfully controverted.

Liability for the former was decreed by the Court below, but relief was denied as to the latter, and, as they stand on somewhat different facts, we shall present the questions separately.

I.

In the Circuit Court, the liability of the bank for the Goldsmith note was rested upon the simple ground that it had received, converted to its own use, and yet retained the proceeds of that note.

The question is not at all one of negligence or imprudent management by which the note has been lost to the complainant

It has been collected by the bank under a claim of title. The question is, therefore, one purely of title to the note, the claim of title on part of the bank being wholly dependent upon Judah's actual authority to endorse the note to the bank as collateral security to the $6,500 note of Walker, Sons & Co., the consideration of which to the amount of $6,000 was an antecedent debt.

It is not pretended, even by Judah, that he (Judah) had express authority to make this very transaction. His alleged power to do so is based upon his previous connection, as agent, with the trust fund, and his testimony to the effect that

he had certain general powers over the fund, as trustee or agent of the complainant.

On this subject Judah says:

Re-cross-intg. 2. "Did her (the complainant's) instructions directly or indirectly authorize you to pledge any bonds or securities obtained with her money for your own debts or the debts of others?"

Answer "No, Sir."

Re-cross-intg. 3. "Then when you say in your examination in chief that the control you had of the fund was as complete as over your own property, do you mean to be understood that such control or power extended only to making loans and investments for Mrs. Walker's benefit, and not for your own or any other person's benefit?"

Answer. "What I intended to say was that my powers were limited to invest her moneys for her exclusive benefit and use, and I thought my language would be so understood."

Transcript, pp 32 *and* 33.

So that if it be conceded that Judah's agency extended beyond the execution and delivery by mail to the complainant of the certificate of deposit (which fact is affirmed by Judah alone, and is most positively denied by the complainant, and contradicted by all the attendant circumstances), it would nevertheless remain true that Judah had no power to pledge the Goldsmith note for an existing debt of Walker, Sons & Co., because:

1. Broad as may have been his general power to sell, re-invest, etc., such general power would not include a power to pledge.

Loving vs. Brodie, 134 *Mass.*, 453.

Pag vs. Cooper, 16 *Beav*, 396.

Perry on Trusts, § 768.

The act of pledging, itself, indicates an ultimate purpose *not to sell.*

The fact that Judah, in advance of the maturity of the note, pledged it for a maturing note of Walker, Sons & Co., is evi-

dence enough to show that he was not acting impartially in the execution of his alleged trust. And the pretense that he was induced to make the pledge by the fact that the note was about to mature, and that its proceeds must therefore have been reinvested, is completely overthrown by the fact that about three months thereafter he appropriated the $5,200 of railroad coupon bonds, bearing interest at seven and eight per cent., respectively, *as to which no such fact existed.*

2. The fair, or apparently fair appearance given to the transaction by Judah, in direct examination, is completely shattered and its hollowness exposed on cross-examination, from which it appears, (1.) that he never informed the complainant of the change of security; (2.) that he studiously concealed the fact by continuing to remit the interest through the firm of Walker, Sons & Co.; (3.)that he was so hard pressed by the bank to pay or reduce the debt of Walker, Sons & Co. that he pledged his personal stocks and diamonds, to the value of $5,000 or $6,000, as collateral to that debt; (4.) that both he and Maas well knew the tottering condition of the firm; (5.) and he finally confesses (ans. to cross-intg. 21, page 22) that he did not make the transaction in the *bona-fide* exercise of his powers to invest.

Transcript 20 to 29.

The bank having full knowledge of the title of the complainant, and that she, in person, held the certificate, and itself accepting as security for the antecedent debt of a third person a pledge of the trust property must prove that the agent had actual power to make the pledge, for the purpose, and in the manner in which he did make it.

To discharge this burden of proof the bank undertakes to bring itself within the rule of

Merchants' Bk. vs. State Bk., 10 *Wall*, 604;

And to sustain Judah's authority to make the pledge, adduces the fact that Judah, as agent, collected the book accounts of Walker, Bros & Co.; that he deposited these collections in the defendant bank to his credit as "guardian;" that, from that fund, he made other loans to the firm of Walker, Sons & Co., to which complainant did not object, and that he bought the

securities in question from that same fund. All this may, perhaps, be best answered in the language of the Circuit Judge: "It is true that she had lent the bank some $20,000 of her other funds; that about one-half this loan was derived from the same source as the fund in controversy here, and that as to that half she had never given any special directions or authority to lend it to the firm, and it was so lent upon Judah's own responsibility as her agent. It is also true that she seems to have made no complaint of that conduct, but it is equally true that she was fully advised of the investments on special deposit in defendant bank; that for some reason Judah desired a receipt showing the deposit; that she set store by it, and that the firm promised to send on the bonds and place them in her own custody. As long as they sent her the coupons, or otherwise remitted the interest, however tardily, she permitted the special deposit to remain with her agent. *But it does not follow from all this that she was willing to lend this firm any more money, or to turn over this special deposit for their benefit.* The implications were rather to the contrary, and especially if she were as fully aware of the firm's weakness as was this bank; and the bank cannot presume on her ignorance."

Transcript 118.

The Court might have gone a step further and said that she was entitled to the benefit of the bank's knowledge, and that even if express authority to Judah to lend the money or securities of complainant to the firm of Walker, Sons & Co. so long as he (Judah) thought the firm in a financial condition to justify the loan as a prudent one, had been produced, the defense must still have failed. Complainant, in the case supposed, would have been clearly entitled to the benefit of Judah's knowledge and impartial judgment, in making the transaction. But here she did not get that benefit, and the bank knew that fact. Both Judah and the bank well knew that the investment was not a prudent one. And the Court cannot fail to see that it was the result of a pressure brought to bear on Judah, based on the fact that the debt from Walker, Sons & Co. had been created on the strength of Maas' "personal friendship for and reliance on the personal integrity" of Judah, and on Judah's promise "always to protect the Bank, if in his power."

Judah's dep. ans. to cross-intg., 29 *and* 30. *Transcript* 23.

The course of reasoning for the Bank at this point is, in any view of the case, too difficult for success. Its proposition is that because the complainant had acquiesced in certain temporary loans to Walker, Sons & Co. (and the evidence shows that the loans were expressly represented to and acquiesced in by complainant as temporary—*Transcript*, 73) of actual money in hand, awaiting permanent investment, she must therefore be compelled to ratify an appropriation of an already permanent investment into the same channel—that appropriation being made by an alleged agent or trustee, in collusion with a creditor bank, both trustee and the bank knowing full well that the investment was not safe, and that the conversion was for the benefit of the bank, and not for that of the *cestui que trust*.

The argument for the defendant bank is almost identical with that presented in the fourth point of the counsel for defendants in the case of

Duncan vs. Jaudon, 15 *Wall*, 165-70-71,

And the answer of the Court must be the same here as there: "She elected to approve it after she learned of the occurrence, and by doing this adopted the new investment, and waived the breach of trust. But her waiver on that occasion did not bind her to observe the same line of conduct in case of further violation of duty. It would be absurd to suppose because she ratified this transaction she intended to assent to future breaches of trust. Indeed, it is quite clear from the evidence that she acquiesced in the arrangement because her relatives, who had charge of the estate, advised it."—Pages 171-2. One cannot avoid imagining the surprise with which this complainant would find it announced by the Court that, because she had acquiesced in certain loans of money to Walker, Sons & Co., and the defendant bank had also made loans of money to the same firm, the Bank was authorized, by that acquiescence, to appropriate to the payment of the demands due to it complainant's permanent securities, held by the bank as bailee, on special deposit.

Complainant could, with the same show of logic, and without the grace of a "by-your-leave," help herself to enough

of the bank's money to pay the debt due her from Walker, Sons & Co, because the bank had therefore loaned that firm large sums of money.

The case is in nowise within the principle of

Merchants Bk. vs. State Bk., supra.

The acts of Judah in converting the permanent securities of complainant cannot be upheld on any presumption of authority based on complainant's acquiescence in his previous loans to Walker, Sons & Co. of money on hand, awaiting investment.

"In the former case the property is held for custody, in the latter for administration," as was said by this Court in illustrating the respective powers of trustees and executors.

Duncan vs. Jaudon, supra, 175.

In truth, the fact relied on in defense strongly tends to negative rather than support the alleged authority of Judah. If the bank knew of the several loans of complainant's money to Walker, Sons & Co. (and it can claim no presumption of authority in Judah except upon such knowledge) it would have been obliged to infer with the knowledge it had of the condition of the firm that prudence dictated rather a withdrawal of what she had already loaned than an increase of credit. *And such was the course pursued by the bank with reference to its own loans to the firm.* In this connection should be noticed the significant fact (adduced and relied on by the defense) that the $5000 loaned to Goldsmith was at first loaned to the firm of Walker, Sons & Co., and, at a time when that firm could afford to do without it, was taken from it and loaned to Goldsmith, as a permanent investment.

Attempt is made to support the agency and authority of Judah after the purchase of these securities by the alleged fact that he customarily collected and forwarded to complainant the interest on the note and bonds.

See Maas' depo., ans. 21, *page* 44.

Complainant emphatically testifies that Judah had no agency for her whatever, after the collection of the book accounts (transcript, 55-6, ans. to intgs., 8, 9 and 10); that the

firm of Walker, Sons & Co., of which her son was a member, alone had authority to make and forward her interest collections; and the correspondence between her and the firm shows that, with one immaterial exception, those collections were invariably made by the firm, and all communications on the subject were addressed to the firm, or by and to complainant's son.

Transcript, pp. 34, 35, *and* 68 *to* 74.

There is no evidence but that of Judah himself—shaken as it is to the point of overthrow—to support his claim of agency. But if it did appear, as claimed by the defense, that he was authorized to collect and forward the interest, that would not support the claim of an authority over the corpus of the securities.

Chattahoochie Bk. vs. Sehley, 58 *Ga.*, 369.

II.

Coming now to a discussion of the liability of the bank for the value of the $5200 of railroad bonds, we premise that much, if not all, of the argument already made in respect of the Goldsmith note is equally applicable to this branch of the case. Under our contention the whole case should be controlled by one general principle. But the Circuit Judge thought otherwise, basing his conclusion on two propositions—one of law and one of fact—both of which we controvert.

1. He held that the special deposit by Judah of complainant's securities in the defendant bank created the relation of bailor and bailee between Judah and the bank, and not between complainant and the bank.

To examine this proposition we must briefly restate some of the admitted facts. The fund with which the securities were bought had been realized from the books of Walker Bros. & Co., and had stood on the defendant's books to the credit of Judah, or Maas, agent or guardian. The complainant demanded an accounting of Judah, and he reported the purchase of these securities, and the special deposit of them in the defendant bank. In whose name they were deposited does not appear, but presumably in the name of Judah, agent.

It is not to be forgotten that the securities were not deposited at the time of the execution of the certificate or acknowledgment of deposit, of date November 27, 1880. They were already then on special deposit in the defendant bank. In this situation of affairs (adopting Maas' version of the matter) Judah went to the bank and said to Maas, "that he wanted a receipt, or statement, rather, of what securities he had on special deposit *to send to Mrs Walker in Philadelphia.*

* * * * * * *

"He said *Mrs. Walker wanted to know what she held* Although we never gave receipts for special deposits, I attached no importance to it at all, considering it merely a memorandum, and without consulting Mr. Goldsmith, the regular cashier, who was writing at the time at his desk, handed Mr. Judah the statement. These are the facts as far as I recollect. *He enclosed it, I think, in an envelope and put it on the desk with the Bank's mail to go off that evening.*"

Maas' depo., ans. 18, *p.* 43.

And complainant testified that the certificate was sent in in lieu of, and in response to her request to send on the securities themselves, and was regarded by her as equivelant to the possession of the securities,

Ans. 4½, *p.* 55

We may remark *passim* that Maas here exhibits, in testimony given about four years after the transaction, a surprising minuteness of memory, in view of the fact that when he was actively engaged on two separate occasions with Judah, about one year after the date of the certificate, in appropriating the securities to the bank, he wholly forgot the fact of ever having issued the certificate.

But, crediting him with truthfulness, the fact remains that *the certificate was issued because Mrs. Walker wanted it; that with Maas' knowledge, or, rather, by Maas himself, it was mailed to the complainant, and it thereafter remained in her possession*, the subsequent disposition of the securities being made without its redilivery to the bank, leaving it outstanding in the hands of the complainant.

Upon this statement of facts we controvert the conclusion of law in the Court below—which conclusion underlies the whole ruling in the denial of the right to recover the value of the securities—to the effect that the Bank was bailee of Judah, and not of the complainant.

In *Foster vs. Essex Bank*, 17 *Mass.*, 479, the certificate of deposit was substantially the same in form, and executed under very like circumstances, as was the certificate here. The exact point here involved did not arise upon the facts in that case; but it does not seem to have occurred to the eminent counsel engaged in that case, or to the Court, even to suggest that the bank was the bailee of the agent who made the deposit.

In *Honig vs. Pacific Bank*, 73 *Cal.* 564, the facts were: Peyser, a collector in the employ of Honig, deposited in the defendant bank, without Honigs knowledge, monies collected for and belonging to Honig, and in designating on whose order the same should be paid out, wrote in the bank register: "K. Honig, by S. A. Peyser." Thereupon the bank issued and delivered to Peyser certificates of deposit, payable to the order of Honig, which were afterwards paid by the bank on the endorsement of Honig's name by Peyser. Honig, learning of the transaction, ratified the act of Peyser in making the deposits, and sued the bank on the certificates, which had been redelivered to the bank on payment. Peyser had no authority, in fact, to endorse the certificates. It was *held* that the bank was liable, and that the case was not affected by the fact that the certificates had been redelivered to the bank and were in its possession at the time of suit brought.

"The person to whom delivery ought to be made is ascer-
"tained by reference to the terms and true import of the bail-
"ment."

Schouler on Bailm, 68.

From the statement already made, it is clear that the certificate of deposit was executed because Mrs. Walker demanded it, and it is equally clear that she demanded it for two reasons. (1.) That *she was not willing to accept Judah's statement of the*

fact, of deposit and (2.) that she might have *in her own possession* the obligation of the bank, evidenced by the certificate; thus establishing and holding in her own hands the evidence of a contract of bailment between herself and the bank.

(2.) The second proposition upon which the opinion below was founded is, that the Bank being the bailee of Judah, the agent, had a right to redeliver the securities to Judah; that its right so to redeliver them is not affected by its knowledge of the fact that Judah was delivering the bonds to the Bank of Commerce as collateral to a loan of money by that bank to and Walker, Sons & Co.; and, incidentally it was found by the Court below, in this connection, that the defendant bank did not receive any part of the money borrowed from the Bank of Commerce.

We have already argued that the relation of bailor and bailee was established between complainant and the bank by the execution and delivery of the certificate of deposit; that it was clearly so intended by the plaintiff, and that Maas, the acting cashier at the time of the conversion, who, as assistant cashier, executed and mailed to complainant the certificate of deposit, must have known that intention. But, passing that, we assail both the other grounds upon which the ruling below was based.

First, we deny that the case in any aspect presents the question of a bailee setting up a *jus tertii* in answer to the bailor's demand for a redelivery. Can the true owner, not only known to be such by the bailee, but who is stated on the face of the contract of bailment, and is recognized to be the principal in the transaction, be characterized as "a third person?" A contract being made by "A. B., agent for C. D.," may A. B. be designated as "a third person" in reference to that contract?

In Story on Bailments, section 106, it is said: "Where a deposit has been made by a servant, in behalf of his master, the goods are to be delivered to the master, especially if he gives notice that they are not to be redelivered to the servant. But a delivery back to the servant would, in many cases, *and especially where there is no reason to suspect any impropriety*, be a good discharge."

It cannot be said that the defendant bank had no reason to suspect that there was no impropriety in delivering the bonds to Judah. Aside from the point already presented, that the execution of the certificate and its transmission by the bank to the complainant severed Judah's connection with the bailed securities, the bank is liable because it turned the bonds over to him for the express purpose of enabling him to misapply them. The condition of the defendant bank is the same in this particular as if it had itself turned over the bonds to the Bank of Commerce on Judah's order, in pledge for a loan made by the latter bank to Walker, Sons & Co. In truth, it did directly deliver to the Bank of Commerce a portion of the bonds.

Depo. of Maas, ans. to 35 *intg., p.* 46.

Depo. of Omberg, ans. to 6 *intg., p.* 36.

The ruling below proceeded on the idea that the Bank was in no sort of relations with the plaintiff, and that it was not therefore liable, no matter that it delivered the securities with full knowledge of and actively aided in the consummation of Judah's guilty pursoses; that it was safe against liability so long as it did not "eat of the forbidden fruit." To state the proposition would seem also to answer it.

The Court is familiar with the line of cases in which corporations have failed in the performance of their well-established duty to protect stockholders against unauthorized transfers of their stock. One such in our State is—

Caulkins vs. Gaslight Co., 1 *Pickle*, 683.

The at least equal obligation of this bank to the complainant is sufficiently apparent without further observation from us.

2. The Defendant Bank should be held liable upon the ground that it did not simply have knowledge of Judah's intention to misappropriate the assets, but joined him in the perpetration of a fraud upon the trust estate, and itself received a portion of the fruits of that fraud.

On this aspect of the case the facts are: The $5200 note of Walker, Sons & Co. discounted by the Bank of Commerce

was dated February 21, 1882. But Omberg, cashier of the Bank of Commerce, says: "My recollection is that we had agreed to make the loan, and that Judah brought over the Mississippi Central bonds, but did not have the Memphis and Charleston bonds; that instead of the latter he had a statement or acknowledgment by L. Levy that he (Levy) held the bonds in New York, deliverable on the return of that certificate. I think I declined to consummate the transaction until the bonds were delivered; but I find from a new (now) examination of our books that Walker, Sons & Co. were overchecked about $5800 when the transaction was consummated, and *I must have allowed that temporarily, on the faith of the Mississippi Central bonds and Levy's acknowledgment.*"

Ans. to intg. 6, p. 36,

At that time the defendant bank held the demand note of Walker, Sons & Co. for $13,500, and that note is credited, under date of February 14, 1882, with $1000.

Transcript, 87.

Turning to the account of Walker, Sons & Co. with the Bank of Commerce (Transcript, p. 39) we find that the account down to and including the 21st of February, 1882, stood thus:

DR.		CR.	
1882.		1882.	
Feb. 6, balance...	$1177.51	Feb. 7, deposit....	$ 400.80
Feb. 7, int.....	11.93	Feb. 21, discount..	5091.38
Feb. 11, checks ..	985.80		
Feb. 14, ...	1000.00		
Feb. 16, ...	1500.00		
Feb. 18, ...	800.62		
Feb. 20, ...	810.13		

The account, as will be seen, shows a check drawn on the Bank of Commerce for $1000 on the very day the $13,500 note is credited by that amount. And, aside from this coincidence of dates and amounts, the note referred to has upon it a memorandum, put there by Maas, in these words: "600 b'ldg stock; 1000 Bk. Com." (Transcript, 79), establishing conclusively that the $1000 check was given to the defendant bank in part payment of the $13,500 note.

Thus far the facts were found in the Court below, but that Court said: "There is no satisfactory proof that the bank got $1000 of the proceeds of the bonds. It may have done so, but it is not certain. The check on the Bank of Commerce, paid to defendant bank, was paid February 14, 1882. The discount on the pledge of the securities was on the 21st, and we know that a part of the bonds were in New York until the 24th. Judah was largeiy overchecked with the Bank of Commerce when the discount was made, and the identical money realized by the discount may or may not have gone to pay this particular check; but as the overcheck was $5800, and the discount was only $5091.38, some part of the overcheck certainly was paid from other sources. We cannot undertake to say that a part of the proceeds has been satisfactorily traced to the defendant bank."

Transcript, 124–5.

The fundamental error of which is (1), that on the face of this finding, indulging every presumption against the complainant (which is the reverse of the true rule in cases of this character), it would still appear that about $200 of the $1000 was paid to the defendant bank out of the overcheck, based on and secured by a pledge of the trust securities; but, secondly, and more vitally, the whole $1000 was paid by the overcheck, permitted on the faith of the pledge of these bonds. It is true that at the time the $5200 note was discounted the overcheck was about $5800; but *at the time the* $1000 *check was given to the defendant bank, the overcheck, including that check, was only* $2777.44. It was swelled to $5800 by the subsequent checks. *There was, in the meantime, no deposit of money whatever*—the $400.80 deposit of February 7th having been more than absorbed by the existing debtor balance of $1177.51. The $1000 payment to the defendant bank was therefore, *to a certainty*, paid by an overcheck on the Bank of Commerce, permitted and secured by a pledge of the trust bonds.

On this state of facts the defendant bank is liable, not simply for the $1000, but for the whole value of the bonds.

"A party who colludes with the executor to obtain the assets, or who obtains the assets by joining the executor in the perpetration of a fraud upon the estate; or who receives the

assets, knowing that the intention of the executor in disposing of them was to commit a *devastavit* or fraud upon the creditors or distributees, is liable and the assets may be followed by them in his hands."

Parker vs. Gilliam, 10 *Yerg.*, 394.

In that case—citing many others in its support—the defendant was held liable for the whole value of the property involved, notwithstanding he held a just debt against the estate, because he entered into a conspiracy with the executor to bring about a judicial sale for the purpose of enabling the executor to embezzle the surplus.

The evidence is sufficient to establish a deliberate conspiracy by Judah and the bank to use the trust property in fulfillment of Judah's promise to protect the bank; and we submit that, in every view of the case, the bank should be held liable for the value both of the Goldsmith note and the $5200 of bonds.

III.

Aside from what we have thus far said, the bank should be held liable both for the note and bonds, on any view that can, on the record, be taken of Judah's agency.

Concede for the argument's sake that that agency continued after the execution of the certificate of deposit; and that his powers, as agent, were as broad as he himself states them—viz., power "to use and manage the fund according to his best judgment, and to do with it for her just as he would do with his own (ans. 7, transcript, 17); the power being to "invest her moneys for her exclusive benefit and use" (ans. 3, transcript, 33).

The powers at most were those of a trustee to manage the fund according to his best judgment for the benefit of the *cestui que trust.*

We have already attempted to show that he was, within the knowledge of the bank, a member of the firm of Walker, Sons & Co. If that be true, he would not, on the broadest

powers of a trustee be entitled *to lend the fund to himself or to the firm of which he was a member.*

Shaw vs. Spencer, 100 *Mass.*, 389.

Duncan vs. Jaudon, 15 *Wall*, 165.

Smith vs. Ayer, 100 *U. S.*, 320.

In *Shaw vs. Spencer*, which may justly be regarded a leading case on the subjeet, the Court said:

"Where one known to be a trustee is found pledging that which is known to be trust property, to secure a debt due from a firm of which he is a member, the act is one *prima facie* unauthorized and unlawful, and it is the duty of him who takes such security to ascertain whether the trustee has a right to give it. The appropriation of corporate stock held in trust as collateral security for the trustee's own debt, or a debt which he owes jointly with others, is a transaction so far beyond the ordinary scope of a trustee's authority, and out of the common course of business, as to be in itself a suspicious circumstance, imposing upon the creditor the duty of inquiry. * * * * Because Spencer, Vila & Co. took these certificates of stock to secure an antecedent debt from Mellen, Ward & Co. to them, with notice that they were held in trust, and made no inquiry as to Carter's authority to use trust property for such a purpose, they cannot retain the security against the equitable owner of the stock, when it appears that Carter in making the pledge was guilty of a fraudulent breach of trust."

Pages 389–394.

And in *Smith vs. Ayer* this Court said: "Whoever takes it (the trust property) for an object other than the general purposes of the trust, or such as may reasonably be supposed to be within its scope, must look to the authority of the trustee, or he will act at his peril."

Page 327.

Many other cases to the same effect are cited in the opinion of the Court below (transcript, 121), but we do not deem it necessary to repeat the citations.

Judah, as trustee or agent, certainly had no power to lend the trust fund to a firm of which he was a member, and the

bank was not merely put upon inquiry, but had actual knowledge of every fact from which the want of authority was apparent.

Judah's act was equally a breach of trust, and the bank a guilty participant therein, even if he was not a member of the firm. It is proven beyond controversy that he was not only in absolute control of the affairs of Walker, Sons & Co., but that, having procured from the bank the loans to that firm on the strength of the personal friendship of the cashier, and his own personal promise to protect the bank, at all hazards, in case of disaster to the firm, he treated himself as under more than the ordinary obligations of a debtor to the bank, pledging his personal stocks and diamonds to secure the debt of the firm. The legal effect of these facts is the same, clearly, as if he had been a member of the firm. Every consideration by which a trustee is forbidden to lend the trust fund to himself is equally potent here. Judah not only undertook to represent both parties to the transaction, so far as concerned a lending of the trust fund to Walker, Sons & Co., but was manifestly in no situation to act freely, in the interest of his *cestui que trust*, in his transactions with the bank.

The bank was under a legal and moral obligation to complainant that, aside from the fact that it received a portion of the fruits of the conversion, forbade it to deliver the trust property in consummation of Judah's unlawful purposes. Considered alone, the delivery of the securities by the bank was vicious; coupled with the appropriation to itself of the Goldsmith note and the $1000 received from the Bank of Commerce, it approaches criminality.

The issue cannot be decided upon an apparent or supposed authority in Judah, but must be determined upon his actual authority. What he undertook to do can be upheld only by a peculiarly enlarged and exceptional—we might say anomolous—character of agency, the burden of proving which was plainly on the bank. It has wholly failed to discharge that burden.

It is asserted, in behalf of the bank, that the evidence in the record proves Judah to have been an universal agent. This conclusion is based upon the general proposition that "no pre-

cise bounds or limits were ever placed upon Judah's agency," and is reached upon a statement of facts which, if conceded to be correct, do not warrant the conclusion. Judah himself testifies, as we have already shown, that he was merely the agent of complainant to collect *choses in action* which she owned jointly with her sister-in-law, with authority to invest her share of the avails thereof, and with no authority to pledge the investments for his own debts or the debts of others.

Much stress is laid in this connection on the fact that Judah was authorized to collect the *choses* and make investments of the moneys realized therefrom. It was but natural that he should have been employed to make the collections. The book debts in question had been created in the course of a business with which he had been intimately connected, so that it was expected he would be in a position to realize more therefrom than any other person. The investments made with the moneys derived from that source were independent of and unconnected with the authority to collect the debts. In reference to the particular securities which are involved in this litigation this is apparent when it is considered that a certificate was issued and sent by the bank to complainant.

The evidence is sufficient to establish a deliberate conspiracy by Judah and the bank, to use the trust property in fulfilment of Judah's promise to protect the bank; and we submit that in every view of the case, the bank should be held liable for the value of the Goldsmith note, and the $5,200 bonds.

S. P. Walker

C. W. McCall

L. Lehman

For Complt

IN THE

Supreme Court of the United States

THE MANHATTAN BANK OF MEMPHIS, TENN.

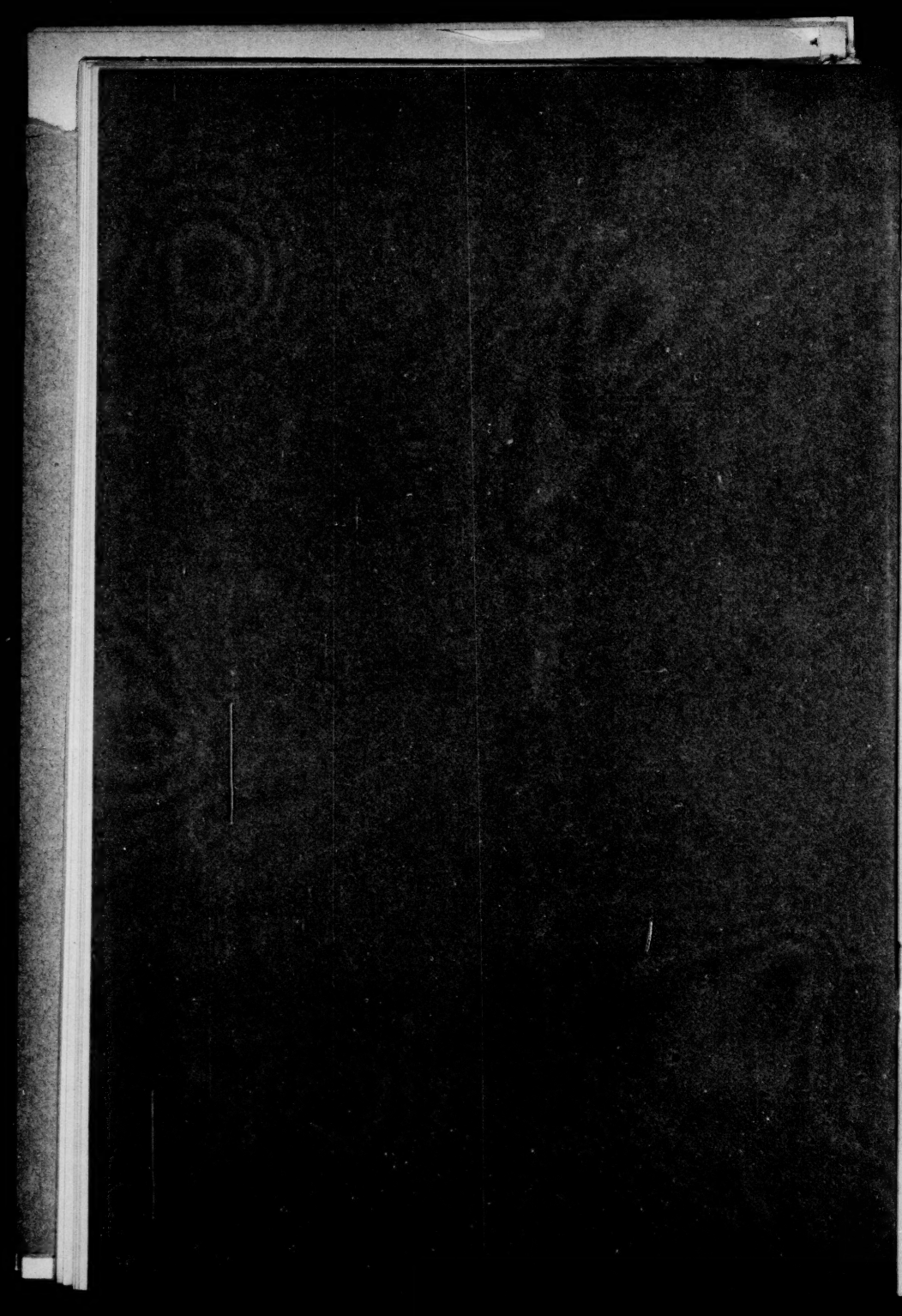
vs. No. 205

ELIZA WALKER.

BRIEF FOR MANHATTAN BANK

On Appeal and Cross-Appeal.

T. B. TURLEY, for Defendant.



IN THE

Supreme Court of United States

THE MANHATTAN BANK OF MEMPHIS, TENN.,
vs.
ELIZA WALKER.

BRIEF FOR MANHATTAN BANK

On Appeal and Cross-Appeal.

STATEMENT OF CASE.

Walker Bros. & Co., a firm composed of complainant's husband, his brother, Benjamin Walker, and his brother-in-law, G. H. Judah, was a large mercantile house in Memphis, which failed and made an assignment in the year 1879. Record p. 58. Complainant and Mrs. Sarah Walker, the wife of Benjamin Walker, claimed to be creditors of the firm. Complainant's demand was never presented to the assignee of the firm. Record p. 67. The two Walkers were never in Memphis after the assignment. Judah continued to reside in that city. Record p. 67. At the assignee sale in 1880, the book accounts of Walker Bros. & Co. were bought in the name of M. 'Maas, the book-keeper of the firm, for the benefit of complainant and Mrs. Sarah Walker, and were turned over to Judah for collection and management. Record pp. 58, 59, 44, 81, 83.

Complainant's husband furnished the money to pay for her interest in the book accounts. Record pp. 58, 64.

Judah was given unlimited discretion and power in the management of the fund thus created for the benefit of his two sisters-in-law. Record pp. 59, 17, 18, 19.

He deposited it as collected with the defendant, the Manhattan Bank, in the name of G. H. Judah, guardian. Record p. 42.

Judah did not consult with complainant nor did he ever receive instructions from her, as to how he should invest her part of said fund. Record pp. 17, 18, 59. At different times he reported to her the condition of the fund. Record pp. 18, 59, 72, 73.

During the year, and prior to 27th of Nov., 1880, Judah bought $3,000 Memphis & Charleston Railroad second mortgage bonds, $2,200 Mississippi Central Railroad second mortgage bonds, and $2,500 or $2,600, Peoples Insurance Company stock, and paid for same with check against his account as guardian in defendant bank. Record pp. 43, 18.

As these securities were purchased, they were placed on special deposit in defendant bank, probably in name of M. Maas, who had in the meantime become assistant cashier of the bank, but really for Judah, guardian. Record p. 44.

Sometime during the year 1880, and prior to Oct., 1880, Ernest Walker, a son of complainant, and Lee B. Walker, a son of Mrs. Sarah Walker, began a mercantile business in Memphis under the firm name of Walker Sons & Co. Record p. 18.

Mrs. Sarah Walker made advances to the firm. Record p. 92. Judah was the business manager of the new firm. Record p. 22. This fact was known to complainant. Record pp. 58, 60. This firm did its principal banking business with defendant from its formation down to the sum-

mer of 1881, when its principal accounts were transferred to the Bank of Commerce of Memphis. This change was made because defendant, owing to its limited capital, was unable to grant the loans needed by the firm in its business. Record pp. 45, 6.

Sometime prior to Nov. 1, 1880, Judah had loaned Walker Sons & Co. $5,000 of the funds held by him for his two sisters-in-law. Record p. 82.

About the 13th of Oct., 1880, complainant, out of life insurance money on the life of her husband, who died during the summer of 1880, loaned said firm $10,000. This loan she says, was made at the instance of Mr. Judah, to enable the boys to commence business. No note was taken for it at the time nor was any security demanded or received. Record pp. 58, 61, 63.

On the 1st of Nov., 1880, Judah loaned Edward Goldsmith $5,000 for twelve months. Goldsmith was informed at the time that it was a fund Judah was managing for one of his sisters. The loan was evidenced by Goldsmith's note, at twelve months, secured by collaterals for the $5,000 and his four notes for $81.25 each for the interest thereon. Goldsmith was handed Walker Sons & Co.'s check on the defendant for $5000. The notes were made payable to Judah, agent. Record pp. 82, 88.

Goldsmith was defendant's cashier, but this loan was made to him as an individual. The Goldsmith notes were placed on special deposit with defendant by Judah, guardian. About the 27th of Nov., 1880, Judah applied to Maas for a receipt, or statement, of the securities he had on special deposit with defendant, for complainant. He stated that complainant wanted to know what she held. The defendant did not give receipts for special deposits, but Maas,

considering the statement asked for as a mere memorandum, without consulting with any other officers of the bank, gave him a statement showing that G. H. Judah, agent for Mrs. Eliza Walker, of Philadelphia, had placed in the bank on special deposit, $3,000 Memphis & Charleston Railroad second mortgage bonds, $2,200 Mississippi Central Railroad second mortgage bonds, $1,100 Peoples Insurance Co. stock, $5,000 note on Edward Goldsmith with collaterals, and $325 interest note on same, and signed it Maurice Maas, assistant cashier. This receipt or statement was written on a letter head of the bank which showed the names of President, Vice-President, Cashier and Assistant Cashier. It will be found in full on p. 114 of the record. This statement was placed in an envelope of the bank and directed to the complainant and mailed to her by that day's mail. About that date entries were made on defendant's special deposit book, showing that G. H. Judah, agent for Mrs. Eliza Walker, had deposited the securities just mentioned, and that G. H. Judah, agent for Mrs. Sarah Walker, had deposited the balance of the Peoples Insurance Co. stock hereinbefore referred to. Record pp. 43, 44.

There is some conflict in the testimony as to whether a letter from Maas accompanied the receipt. No letter is produced, nor is the contents of any such letter proved. No such letter appears on the bank letter book. If one was written, it was of so little importance that complainant did not think it worth preserving. Record pp. 47, 55, 82, 84.

The complainant never wrote to defendant nor communicated with it in any way about the statement or receipt until Dec., 1882, or Jan., 1883, about the time of the

failure of Walker Sons & Co. Record pp. 44, 59. As long as these securities remained with defendant, the interest was collected by Judah and turned over to Walker Sons & Co., and was through that firm at irregular intervals remitted to complainant. Record pp. 18, 56, 60, 71, 74.

About the 14 of Jan., 1881, Judah loaned Walker Sons & Co. for complainant $4,791.75, and on the 6th of June, 1881, he made them a similar loan of $2,972.54. Both these amounts were realized from the book accounts of Walker Bros. & Co. Complainant admits that she knew of these loans and that she further knew they were made without the taking of notes or security therefor. On the 28th of Feb'y, 1881, complainant loaned Walker Sons & Co. $2,000 without note or security. Record pp. 61, 62, 63, 65, 66, 73.

Goldsmith went to New York in March, 1881, and remained there until Oct., 1883, paying occasional visits to Memphis to inspect the condition of the defendant, of which he remained cashier. Record pp. 77, 83.

Goldsmith's note at twelve months, matured Nov. 1, 1881. Before it matured Judah applied to him to renew it, but Goldsmith declined. Record pp. 17, 83. Judah says that in the summer of 1881, he informed complainant that it was doubtful whether the Goldsmith note would be renewed and she told him if it was not, to do what he thought best with the money. Record p. 18. This fact is denied by complainant and her daughter, Belle Walker. Record pp. 57, 74.

On the 22d of Oct., 1881, a note of Walker Sons & Co. for $6,000 held by the defendant, matured. This note was well secured by country paper of the firm. On the day of its maturity, Judah asked Maas to hold it up until Nov. 1, 1881, telling him that the Goldsmith note would be paid

on that day and he intended loaning the $5,000 to Walker Sons & Co., and that with it and the proceeds of some cotton they could take up the $6,000 note to the defendant bank. Maas replied that the defendant did not wish to carry past due paper, and suggested that he discount the Goldsmith note and make a short loan for Walker Sons & Co. for the balance. Thereupon defendant discounted the Goldsmith note and a short note of Walker Sons & Co. for $1,500 and surrendered to Judah the note of Walker Sons & Co. for $6,000, together with the collateral held by it to secure the same and handed him the balance of the discount money over the counter. Record pp. 44, 46, 85.

About the 21st of Feb., 1882, or a few days prior thereto, Judah asked Maas, as assistant cashier of defendant, to loan the firm of Walker Sons & Co. about $5,000 upon the faith of the Memphis & Charleston Railroad bonds, and the Mississippi Central Railroad bonds, described in said statement of Nov. 27, 1880. Maas declined making the loan, inasmuch as Walker Sons & Co. were not then regular customers of the defendant. Thereupon, or shortly thereafter, Judah as agent for Walker Sons & Co. withdrew these bonds from defendant, and gave Maas a receipt for same. Judah then carried the bonds to the Bank of Commerce, and pledged them with that bank, for a loan of about $5,200, made by it to Walker Sons & Co. Maas knew that Judah expected to pledge the bonds at the Bank of Commerce for the benefit of Walker Sons & Co. when he delivered them up to him. The Manhattan Bank received no benefit from this transaction. Record pp. 36, 37, 48, 49, 67.

During the year 1882, much correspondence passed be-

tween Walker Sons & Co. and Judah and the complainant in this cause, in reference to the fund under Judah's control and the debt due from Walker Sons & Co. to complainant. See Record pp. 70, 74, 34, 35.

On the 3d of May, 1882, Walker Sons & Co. sent complainant two notes, both due one day after date. One for $10,000, signed E. L. Walker and Walker Sons & Co., and one for $9,764.29, signed Walker Sons & Co. Record p. 102.

In the fall of 1882, complainant seems to have been much in need of money. She wrote and telegraphed to Walker Sons & Co. on the subject. Record p. 34, 35. Although she seemed at that time to have been in great need, and although Walker Sons & Co. seem to have been remiss in paying her interest, or making any provision for their debt to her, not one word is heard from her by the defendant bank.

In Dec., 1882, Mr. Adam Kramer, son-in-law of complainant, visited Memphis to see the members of the firm of Walker Sons & Co. in relation to complainant's debt against that firm. See Record p. 90, 91. While in Memphis he called on Maas at the Manhattan Bank. There is a conflict between Maas and Kramer as to what then occurred between them. Kramer says, that he had the receipt of Nov. 27, 1880, and that he demanded the securities described therein, from Maas, and when he found they had been delivered up to Judah, he told Maas that he intended holding defendant liable for their value. Maas says he made no such demand. That he simply inquired if the defendant still held the bonds and securities, and when he was informed that it had delivered them to Judah, replied, he thought so. Record pp. 11, 48, 53.

Maas is sustained on this point, by the fact that although Kramer met Goldsmith, the regular cashier in the bank, and had a conversation with him, he failed to mention the subject of these securities; nor did he make any demand or inquiry of any other officer of the defendant bank. Record p. 83. During his visit of 1882, Kramer saw the members of Walker Sons & Co., and urged the settlement of complainant's debt against it. A check was given him on account, which was not paid. Record p. 92. Kramer returned to Memphis again in Jan., 1883, about the time of the failure of Walker Sons & Co. During this visit, he obtained from Walker Sons & Co. a large amount of their country paper as security for the indebtedness due from them to complainant. The title to this paper was afterwards involved in litigation in the case of Raphael Bachman v. Eliza Walker in the United States Court at Helena, Ark. The record of that case will be found in this record, p. 89, *et seq.* Kramer's deposition was taken in said case and in said deposition he states explicitly that both his visits to Memphis were to secure complainant's claim against Walker Sons & Co. See record pp. 90, 1, 2, 3, 4. Walker Sons & Co. failed in Jan., 1883, owing the defendant bank $5,000, which is still unpaid. Thereupon, complainant filed her bill in this cause to hold the defendant liable for the value of all the securities mentioned in said receipt of Nov. 27, 1880, except the Peoples Insurance Company's stock, which stock was received for her by Kramer during his visit to Memphis in Dec., 1882, or Jan., 1883. The defendant in its answer relied upon its delivery of said securities to Judah as complainant's agent.

The circuit judge held defendant liable for the Goldsmith note, and decided in its favor, so far as the bonds were concerned.

ASSIGNMENT OF ERROR.

The defendant assigns for error the action of the court below, in holding it liable to complainant, for the amount of the note of Edward Goldsmith and interest thereon, from the 1st of Nov., 1881.

ARGUMENT.

The bank is a bailee without reward. It stands just as any individual would, who, having a safe for his own valuables, permits his friend, as a matter of accommodation, to leave valuables therein. By all the authorities such a bailee is liable only for gross negligence.

Foster v. Essex Bank, 17 Mass. 479.
Giblen v. McMullen, L. R. 2 P. C. 317.
Chattahoochie Bank v. Schley, 58 Ga. 369.
Ray v. Bank, 10 Bush 344.
Floyd v. West Branch Bank, 15 Pa. St. 172.
Leads v. Trenton Bank, N. J. Law & Eq. Dig. p. 78.
Scott v. National Bank, 72 Pa. St. 471.
National Bank v. Grehan, 79 Pa. St. 116, 118.
Tompkins v. Saltmarsh, 14 Serg. & Rawl. 275.
Smith v. First National Bank, 99 Mass. 605.
Lancaster Co. Nat. Bank v. Sweet, 62. Pa. St. 47.
Wiley v. First National Bank, 47 Vt. 555.
Story on Bailments, sec. 72.
First Nat. Bank v. Owen Nat. Bank, 60 N. Y. 294, 5.
Hayner v. Warring, 29 Ala. 265.
Samples v. Scott, 24 Miss. 533.
Schouler on Bailments, 2d Ed., s. 15, pp. 48, 49; 42 to 45, and notes as applicable to special deposits in bank.

The execution of the written receipt in no way enlarged the contract or added anything to the liability of the bank.

In the 17 Massachusetts case, where the receipt was substantially like the one in the case at bar, the court says: "As to the first of these points, supposing the bank to be answerable for any special undertaking of the cashier, we perceive no evidence of such an undertaking in this case. The writing signed by the cashier is merely a memorandum, signifying that the chest and its contents were left in the bank *for safe keeping*. It contains no promise, and assumes no risk, other than would be derived from the mere delivery without any writing. Nor does it receive any additional force from the presence of Mr. Orne (the President), and his certificate of the gold having been weighed in his presence. For in this he did not act or sign officially; and if he had assumed to do so, it not being within the scope of his authority, as president, to charge the bank with any special liability, his act could not have bound the bank or corporation, who, according to the practice as found by the jury, take no notice of special deposits. [In the case at bar the directors took no notice of special deposits. See Goldsmith's deposition.] And the same may be said of the memorandum signed by the cashier. For if he had undertaken to make the bank specially answerable for a deposit contrary to its usage and to the nature of the contract implied by accepting such a deposit, such an undertaking, without previous authority or subsequent assent, would have failed to implicate the bank." 17 Mass. 504.

Where a deposit has been made by a servant or agent, the delivery back may be made to the agent.

Schouler on Bailment, 2d edition, secs. 33, 22, 58, 59.
Story on Bailments, secs. 106, 109.

Other questions out of the way, and clearly Judah's authority to withdraw the deposit was not changed by the simple execution of the receipt or certificate.

There was nothing in the circumstances under which the receipt was given to change this result. Mrs. Walker, the principal, never applied for the receipt. It was issued at the instance of the agent, Judah. It does not recite that Mrs. Walker had made the deposit, but that Judah as her agent had left the securities for safe keeping. The securities were still in Judah's agent control, just as much so as they would have been in his own safe, or in his locked box left with the bank. The explanation given was, not that the agency was terminated, but simply that the agent wished to let his principal know what securities he had on hand for her account and where he was keeping them. It amounted to no more than Judah bringing Mrs. Walker to the bank and saying to her in the presence of the assistant cashier, "The fund in my hand as agent has heretofore been held and managed by me as a common or joint fund, but I have now separated it, and hereafter these securities will be held and managed by me for you individually." Inasmuch as the receipt was given to the agent at his request and without the interposition of the principal, the principal is bound by everything the agent did or said, and we confidently submit that no reasonable man, upon the facts attending the issuance of this receipt, would have thought that the powers of Judah were thereby altered or changed in any respect. If we are wrong in this position, then Mrs. Sarah Walker could say to the bank: "You knew that Judah was holding this fund for the joint benefit of Mrs. Eliza Walker and myself, you permitted him to separate or divide it, and you delivered to him as the agent of Mrs.

Eliza Walker more than her share. I will therefore hold you responsible for the loss thus sustained by me." Would such a position be for a moment tolerated by any court?

But let us see how the receipt was treated by the complainant herself—the practical construction placed upon it by her. The terms of the receipt applied equally to all the securities mentioned therein. If Judah's agency was terminated it was terminated as to everything covered by the receipt. If his powers were in any way altered or changed they were altered as to all the securities. Yet we find him and the firm of Walker Sons & Co., with the knowledge and approval of the complainant, regularly withdrawing and collecting the Goldsmith interest, notes and the coupons, and this without the production of the receipt or any order therefor from the complainant. And the complainant herself says that she supposed her son could get these securities without her order or the receipt.

Both sides then construed the receipt alike, and we may safely conclude that there was nothing either in the execution of the receipt itself, or in the circumstances under which it was executed, to put the bank upon notice that Judah's agency had been either terminated or altered.

Having considered the effect of the receipt, the next question in the order of reasoning, though not in the order of time, is whether or not the bank is liable for the value of the bonds hypothecated by Judah for the benefit of Walker Sons & Co. at the Bank of Commerce. To hold the bank liable the complainant must establish all the following propositions:

1. That on the facts of this case it was a breach of trust in Judah to lend the bonds to Walker Sons & Co. in the manner in which he did.

2. That the bank knew what Judah intended to do with the bonds, and must have known that the legal effect of such lending was a breach of trust, or in other words that with the facts before the bank it was gross negligence on its part not to have known that the lending was beyond and outside of Judah's power as agent

3. That even though a gratuitous bailee surrender the property bailed to an agent duly empowered to receive it, yet the bailee will not be thereby discharged if it has notice or information that the agent intends in his next dealing with the property to do an act which is outside of and beyond his authority.

We think that the complainant must fail on all these propositions.

In considering the first proposition, the facts necessary to be noticed are that no precise bounds or limits were ever placed upon Judah's agency. The complainant was a passive principal. She never in any way interfered with the management of her property. The very circumstances under which she acquired her interest rendered it necessary that the fund should be placed in the absolute control of Judah. He first held the fund for the common benefit of complainant and her sister-in-law, Mrs. Sarah Walker. He loaned it out, collected it back, and re-loaned it. He invested in securities without consulting with or reporting to his principals. He divided the funds and securities between his two principals, according to his own judgment and without consulting either. He retained control and management of the shares thus divided. The principals did not take or change the possession, as would have been done if they had intended to curtail his powers. He made

frequent loans to Walker Sons & Co. without security and with the tacit consent at least of complainant. The complainant herself, when requested by Judah, had made advances to said firm or at least to her son out of other funds held by her, and without taking security therefor. In the history of this case where was any limit ever placed on Judah's powers? His agency was not only general; it was universal.

Wharton on Agency, s. 116, p. 72.
Wharton on Agency, s. 122, p. 75.

The fact that Judah was also the agent of Walker Sons & Co. makes no difference. This fact was well known to complainants from the beginning of these transactions. In short, the record shows that Judah was placed in absolute control of the fund or property sued for, to manage as he deemed best, untramelled by a single limitation or condition. The just and reasonable conclusion is that his power extended to the loan in question. The question is, did he have power to make it? not whether it was a wise or prudent exercise of the power. His principals took the risk of his prudence and wisdom.

In determining the second proposition we are to consider not so much Judah's actual power and authority as his apparent power. The true question is, were the apparent powers which he was permitted to exercise such as to preclude the idea of his having authority to loan these bonds to Walker Sons & Co. Was it gross negligence in a man of ordinary intelligence to suppose that his power extended so far, or was it ordinary negligence? The facts already commented on bear on this point also. We simply refer to them without repeating our construction of their meaning and effect.

It will be borne in mind that the bank derived all its knowledge on this subject from Judah's acts and statements. He claimed to have the authority. All his previous acts with reference to this property supported his claim; the bank had no cause to distrust or disbelieve him; there was no fraud in fact or collusion in the transaction, and no personal benefit to either Judah or the bank. How, then, can it be said that the bank was guilty of negligence of any kind in believing Judah's statement that he had authority to make the loan?

To test the question sharply, this case has been elaborately argued upon all the facts that could be brought out by either side. Can the court, after all this investigation, say that Judah did not have authority to lend the bonds to Walker Sons & Co.? If it is difficult for the court to decide, can it be said that the bank is to blame for having made a mistake, even if it be conceded that it did make a mistake? Again, suppose the bank had refused to give up the bonds to Judah, and loss had occurred to complainant, and when the bank was sued for such loss it had defended the suit upon the theory relied on by complainant's counsel, would it not have been at least a very doubtful lawsuit? How, then, can it be said that the bank has been guilty of negligence?

Certainly in the case at bar the bank will not be held to a higher degree of prudence and caution in investigating the scope and extent of Judah's authority than a purchaser of the bonds from him would have been. As gratuitous bailee we insist it was only bound to exercise ordinary diligence in determining whether Judah had the right to withdraw the deposits or not, and that beyond this it was not

bound to inquire at all. But let us see the rule as applied to purchasers of trust property:

In Jones v. Smith, 19 Eng. Ch. Rep., Thomas Smith was applied to to advance money on mortgage security on the real estate of David Jones. When applied to to advance money upon this security Smith asked whether there was any settlement executed on the marriage of David Jones and his wife; he was told there was a settlement, but that it was confined to the wife's property, and did not extend to the real estate of David Jones. Smith then asked for the production of the settlement; David Jones replied that it was in the possession of his wife's brother, and that he was afraid he could not get possession of it without displeasing his aunt, who was a very rich old lady. Smith relied on these statements, and loaned the money without insisting on the production of the settlement. It turned out the statements were false, and the real estate was embraced in the settlement. The contest was between Smith's claim under his mortgage, and those claiming under the settlement, the latter insisting that Smith was affected with notice of the contents of the settlement. The Lord Chancellor said (page 253): "The question therefore resolves itself into this, whether, where a party is informed of the existence of an instrument which may, but which does not necessarily affect the property he is about to purchase, or upon which he is about to advance money, and it is at the same time stated that the instrument does not affect that property, but relates to some other property, whether, if he acts fairly and honestly, and believes that statement to be true, but it turns out in the result that he is misled, and that the instrument does relate to the property, he is under such circumstances to

be fixed with notice of the contents of the instrument?" After discussing the authorities, the Chancellor proceeded (on p. 256): "Undoubtedly, in the present case, a cautious, prudent, circumspect person would not have advanced money without production of the deed; but that is not the principle on which cases of this sort have been decided. The case of Cathay v. Sydenham (2 B. C. C. 391), which was one of the cases cited at the bar, was of this description: A party had notice of the draft of a settlement having been actually prepared; in fact he had himself prepared it. The question was whether he was to be considered as having constructive notice of the deed itself. Now a *prudent, cautious and wary* person, knowing that a draft had been prepared, would take care to enquire before he advanced his money, whether a deed had been executed in conformity with that draft; yet Lord Thurlow held that a party having notice as a purchaser—the case was that of a trustee, but he put the case of an ordinary purchaser—that the draft of a deed had been prepared, was not to be considered as having constructive notice of the deed itself, unless he knew that the deed had been executed. Suppose that, in this case, the party had been told that there was no settlement, it is quite clear he would not have been affected with notice; still notwithstanding the statement that there was no settlement on the marriage, a person about to advance his money, if he were *a very prudent, cautious and wary* person, would enquire of the connections of the parties whether or not a settlement had been executed before he advanced any considerable sum of money. I don't think, therefore, that the present case goes beyond this, that a prudent, cautious and wary person would have enquired further. *The want of that prudence, caution and*

wariness is not sufficient, according to the decisions and the principles which have hitherto been acted on, to affect the party with notice. I do not consider this a case of gross negligence; and I am of opinion that the party having acted *bona fide*, and having only omitted that caution which a prudent, wary and cautious person might and probably would have adopted, is not to be fixed with notice of this instrument."

Jones v. Smith, 19 Eng. Ch., 1 Ph. 256.

See also to same effect, 3 Del. Ch. 398; 11 Ired. Eq. 591–2; 1 Hare 53; 31 Grat. 149; 2 Lumm. 551; 2 Johns Ch. 190; 2 Lead. Cas. in Eq., pt. 1, 167; Woodworth v. Paige, 5 Ohio St. 76; 7 Johns Ch. 150.

So putting the case most strongly against the bank and treating it as if it were the purchaser of the bonds, the question would still be, not whether it was as astute as learned counsel are in looking back over the case, nor as careful as your Honors will be in deciding between the parties, but did it act honestly, fairly, in good faith and with ordinary circumspection.

So far as the third proposition is concerned, we have already shown that there was nothing in the receipt, or in the circumstances under which it was executed, or in the subsequent conduct of the complainant, to affect Judah's authority to withdraw the deposit. The bank surrendered the deposit in perfect good faith without receiving a particle of benefit from the transaction. What is the contract of a gratuitous bailee? What obligations does he assume? What duty does he undertake to perform? Simply to keep the deposit safely and return it to the person authorized to receive it. Further than this, the officers could not bind

the bank. Upon such a contract where can any obligation or duty be predicated to go beyond the safe keeping and redelivery of the deposit and guard it against subsequent dangers? Who ought to have taken the risk of Judah's good faith and fair dealing after the redelivery of the deposit, Mrs. Walker or the bank? What consideration was ever paid the bank for keeping watch on Judah to see that in all his subsequent dealings he kept within the bounds of his authority? City Bank v. Kent, 57 Ga. 283, 303, is a strong case on this precise point. It holds that as long as the bank acts in good faith, and the agent is within his apparent powers, the principal must take the risk of any abuse of power by the agent.

A gratuitous bailee has no more to do with what becomes of the deposit after he redelivers it in accordance with the terms of his contract than any other person has. Notice to him or knowledge acquired by him of contemplated dealings with the property, is of no greater effect than notice to any third person or any other strangers. And where the bailee is a corporation, such information to one of its officers or agents, we insist, is not legal notice to it because it is of contemplated acts beyond the scope of the contract assumed by the corporation.

Even in the case of purchasers and persons dealing directly with the trustee, mere notice that the trustee intends in the next disposition which he makes of the trust fund to commit a breach of trust, is not sufficient to involve the party so trading or treating with the trustee in the consequence of the subsequent breach of trust. It requires something more; there must be some participation in the breach of trust.

See ——— v. ——— Vol. I, part 1, Leading Cases in Equity, p. 114.

Chief Justice Marshall lays down the same doctrine. He says "if the purchase money is misapplied with the *co-operation of the purchaser*" then he is liable.

Potter v. Gardner, 12 Wheat. 503.

The distinction is shown in the case of Duncan v. Jandon, 15 Wal., where certain shares of stock were vested in a trustee upon specified trusts without giving him, however, the power to either sell, mortgage or pledge. He pledged the stock to Duncan for an individual loan.

There the transaction between Duncan and the trustee was in itself a breach of trust, and Duncan was held liable for the stock.

1 Story Eq., sec. 395, 15 Wal. 165.

The cases where the purchaser has been held liable are all, or nearly all at least, like the case cited above from 15 Wallace, that is, cases where the direct transaction between the purchaser and trustee was a breach of trust and so known to be by the purchaser at the time.

In the case of Wormley v. Wormley, so often cited on this question, the sale of the trust fund was not for reinvestment under the terms of the trust, but to pay a large debt due to the purchaser himself.

Wormley v. Wormley, 8 Wheat. 447.

The case of Clyde v. Simpson is of the same character. This was a case of *lis pendens*, and the purchaser, the court says, participated in the breach.

4 Ohio St. 464.

In Chaplin v. Haight, the facts were as follows: The trustee had power to sell, to reinvest on certain limitations for the use of a large class of beneficiaries. A portion of the

beneficiaries combined with the trustee to bring about a sale, not to reinvest, but for the avowed purpose of dividing the purchase money amongst themselves to the exclusion of the other beneficiaries. When the property was offered for sale, the beneficiaries, whom it was intended should be excluded, made known all the facts and notified the purchaser of the object for which the sale was being made, and it was shown in the proof that the sale was made for the avowed purpose of committing a breach of trust, in which the purchaser participated.

Chaplin v. Haight, 10 Paige 275.

In Nichols v. Peak, the trustee had ~~just~~ first mortgaged the trust estate for his own private debts. He then pretended to sell it under his power of sale as trustee, and the purchaser himself retained a portion of the purchase money and applied it to paying off the mortgages, well knowing their character at the time.

1 Beasley 69.

No case has been produced on the other side where a gratuitous bailee or any person under like obligations has been held liable under such circumstances as are presented in the case at bar. They are all or nearly all cases of the selling or pledging of trust property by the trustee where the very act of selling or pawning constituted of itself the breach of trust, and where the lender or purchaser was put upon notice of the character of the act in which he had participated.

As to the Goldsmith note, much of the argument already made bears on this part of the case also. Judah had power to withdraw the note; he had power to collect it. View this transaction as we may, and it simply amounts to this:

Goldsmith had determined to repay the loan, and Judah was aware of the fact. Some other disposition of the fund had to be made. Walker Sons & Co. wished to borrow it. They needed it a few days before the Goldsmith note matured. Judah, in substance, collected in the money a few days before maturity and loaned it to Walker Sons & Co. to pay a debt to the Manhattan Bank. The bank acted in good faith. The debt from Walker Sons & Co. to it was secured. Did the bank have the right to believe that Judah's authority justified him in making the loan to Walker Sons & Co.?

We say Judah had actual authority to make the loan. His control over the fund had been unlimited. This very money had been loaned to Walker Sons & Co. before it was loaned to Goldsmith. *The money had to be reloaned or reinvested.* All parties admit that Judah had the right to loan out or invest. He made similar loans to Walker Sons & Co., and reported same to complainant. It will not do to say these were temporary, for this particular loan might have also been temporary. The question is simply, did he have the right, or was he clothed with the apparent right to loan out the money? If so, it was not the duty of the bank to see whether the loan was a wise one or not, or whether it was well secured or not. These were matters between Judah and his principal.

It is admitted that Judah had authority to loan the $5,000 to Walker Sons & Co. in the first instance. It is admitted that he had authority to make the several loans to Walker Sons & Co., which were made during the year 1881. Complainant herself admits that Judah had entire control over the fund for investment. It is admitted that

Goldsmith had refused to renew the note and intended paying it promptly at maturity. It is perfectly clear, we submit, that it was strictly within the province of Judah's powers to reloan the money thus paid by Goldsmith; and that the complainant expected him to reloan it. She knew the note matured on the first of November, 1881, and she never made any inquiry of Goldsmith or the bank about it. How can this conduct be reconciled with any other theory than that she expected Judah to control the money as to its reinvestment? Having this power, Judah certainly could anticipate the payment of the note a few days if he had found another place where the funds could be reloaned. The defendant surrendered to him at the time of the transaction ample security with the $6,000 note of Walker Sons & Co. It is not claimed that defendant had any knowledge that Judah was loaning the money to Walker Sons & Co. without security. Can there be any difference between the case as it actually occurred, and one where Judah took the note to some other bank in Memphis, cashed it, loaned the money to Walker Sons & Co., and it was used by that firm in payment of the $6,000 note to defendant?

Again, suppose defendant had declined to let Judah control the Goldsmith note, and Goldsmith had failed, and his collaterals proved to be worthless; would it not have been liable to complainant upon the facts set out in this record?

T. B. TURLEY,
For Defendant.

130-280

130-280

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 808. ~~482~~ 206

THE UNITED STATES, PLAINTIFF,

vs.

S. H. PILE.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED NOVEMBER 18, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 808.

THE UNITED STATES, PLAINTIFF,

VS.

S. H. PILE.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

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1 Middle district of Tennessee, circuit court of the United States for said district.

Indictment was filed October 20th, 1882.

UNITED STATES
vs.
S. H. PILE AND A. J. MACE.

For violation of pension laws.

Oct. 26th, 1883, the following proceedings were had, to wit:

Came the U. S. att'y and says he desires no further to prosecute herein as to deft. A. J. Mace. It is therefore considered by the court that this case be dismissed as to him.

Oct. 27th, 29th, 30th, 1883, jury empannelled and a mistrial in case of United States vs. S. H. Pile.

On October 28th, 1884, present Honl. D. M. Key, judge, the following proceedings were had:

UNITED STATES
vs.
S. H. PILE. # 3690.

Came the United States district attorney and the defendant in proper person, and the said defendant being charged upon the indictment pleads not guilty thereto, and for his trial puts himself upon the country,
2 and the said attorney for the United States doth the like, and thereupon came a jury of good and lawful men, to wit: S. E. Davidson, H. H. Hicks, B. A. J. Nixon, W. H. Paris, H. P. Gray, Granville Washington, S. V. McManus, Fred Degrass, Jno. L. Taylor, A. G. Carr, E. J. Yeamon, and Charles A. Hummell, who, being elected, tried, and sworn well and truly to try the issues joined, after hearing the evidence, the argument of counsel in part, were respited until to-morrow morning at 9 o'clock.

Oct. 29, '84, came again the U. S. att'y and the defendant in proper person, and came again also the jury heretofore empannelled in this cause, who, after hearing further argument of counsel and the charge of the court, upon their oaths do say that the defendant is guilty in manner and form as charged in the indictment, and recommend the defendant to the mercy of the court.

And thereupon the defendant moved the court to arrest the judgment herein, which motion was by the court overruled, and thereupon the defendant, by attorney, moved the court for a new trial herein, which motion,
after argument of counsel, the court also overruled, and thereupon
3 it is considered by the court that the defendant be confined in the jail of Davidson County for three months and forfeit and pay to the United States a fine of $250, and the costs of this cause, for which let execution issue, and that defendant be confined until said fine and costs are paid or he is otherwise discharged by due course of law.

Oct. 31st, 1884, present Hon. D. M. Key, U. S. judge, presiding, the following proceedings were had, to wit:

UNITED STATES } # 3690.
vs.
S. H. PILE. }

Came the U. S. att'y and the deft. in proper person, and upon application of the deft., the execution of the judgment heretofore entered herein is suspended until the fourth Monday in November next, upon defendant entering into recognizance for his appearance at that date. And thereupon came John C. Wright, who with defendant acknowledged himself indebted to the United States in the sum of $2,000, conditioned upon the appearance of defendant on the 4th Monday of November to abide by and perform the judgment of the court, and that he shall not depart without leave of the court.

4 On Nov. 24th, 1884, on motion of defendant the execution of the judgment herein was suspended until the next, term of the court.

April Term, 1884.

On April 23d, 1884, the following proceedings were had:

UNITED STATES } # 3690.
vs.
S. H. PILE. }

Upon sufficient grounds appearing to the court the judgment of fine and imprisonment pronounced in this cause at the last term, and the judgment rendered at the last term of this court on the motion in arrest of judgment overruling the same are hereby set aside and for nothing held. And thereupon comes the defendant by his counsel before the circuit and district judges and moved that the judgment in this case be arrested, and for causes sets forth the following:

5 1st. The indictment does not aver any specific intent to defraud the United States or other party.

2d. The indictment is delusive, uncertain, repugnant, or inconsistent.

And the motion coming on for argument before the honorable the judges aforesaid, and they being unable to agree as to whether the said motion is well taken or not, but having divided in opinion touching the same, at the request of the counsel of the defendant, a certificate of division is filed by the said judges, which is ordered to be made part of the record in this case. And no further steps will be taken in this case till the Supreme Court shall have adjudicated the question in said certificate set forth. The district attorney excepted to the order of the court setting aside the judgment of the court rendered at the last term overruling the *the* motion of defendant to arrest the judgment, and to the signing of division of opinion at this term of the court.

It is ordered that the clerk certify the entire record of this cause to the Supreme Court.

It is further ordered that defendant enter into bond with good
6 security in the penal sum of two thousand dollars conditioned that he make his personal appearance at the Federal court-room in Nashville, on the first day of April term of said circuit court, 1886, then and there to abide the further order of said circuit court. The defendant objects to the copying of any part of the record not authorized by law or the rules of the Supreme Court.

Certificate of division.

UNITED STATES OF AMERICA,
Middle District of Tennessee:

At a circuit court of the United States, begun and held at Nashville, for the middle district of Tennessee, on Monday, the 22d day of April, in the year of our Lord one thousand eight hundred and eighty-five, and in the year of American Independence the 109th. Present, the hon'l. John Baxter and the hon'l. D. M. Key.

THE UNITED STATES
vs.
S. H. PILE.

In this case the indictment agninst the defendant is in the words and figures following:

7 In the circuit court of the United States for the middle district of Tennessee, October term, 1882.

The grand jurors for the United States and the district aforesaid, duly elected, empannelled, and sworn, and charged to inquire for the body of the district aforesaid upon their oaths, present: That Stephen H. Pile and A. J. Mace, in the district aforesaid, on the 15th day of May, 1880, with force and arms unlawfully did falsely make and forge, and cause to be made and forged, and did willingly aid in the false making and forging, for the purpose of obtaining and receiving and enabling Daniel Malone to obtain and receive from the United States a sum of money, a certain paper writing purporting to be the affidavit of John Frogge and others, and jurat and certificate of the said A. J. Mace, J. P., appended thereto, which false and pretended affidavit, jurat, and certificate is in the words and figures, following, viz, "We the undersigned citizens of Fentress County, Tenn., and neighbors of Daniel Malone, P. O. address, Pall Mall,
8 Tenn., upon our oaths do say that we have been acquainted with said Daniel Malone for 20 years, and that the condition of his leg at the date of his discharge was a running sore upon his left leg, and each year since 1865 said sore begins running in warm weather, and in cool weather will close again, and said leg to-day disables him from manual labor, and we are not concerned or interested in the prosecution of this claim.

WILLIAM RENNECOURT.
JOHN FROGGE.
T. H. RAMSEY.
MATTHEW his + mark. PENNECUFF.
JOHN his + mark. PENNECUFF.
JAMES FROGGE.

Sworn to and subscribed before me this 15th day of *day of* May, 1880. I certify that the above witnesses are entitled to full faith and credit, and the foregoing affidavit was read and explained to them before they executed their names thereunto, and I am not concerned in this matter.

A. J. MACE, *J. P.*

That at the time said affidavit, jurat, and certificate set out as aforesaid was falsely made and forged as aforesaid the said Daniel Malone was prosecuting a claim for a pension in the Department of the Interior, and the facts recited in said pretended affidavit, if true, were material in
9 said prosecution and that the said A. J. Mace was at the time of the false making and forging said affidavit, jurat, and certificate a justice of the peace of the said county of Fentress and subscribed his name to said jurat and certificate with the letters J. P., as above set out, intending thereby to denote his official character, and said false affidavit, jurat, and certificate were made and forged as aforesaid for the purpose aforesaid and to be used in said prosecution of said claim, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

ANDREW McCLAIN,
U. S. Att'y.

Filed Oct. 20th, 1882.

LEWIS T. BAXTER, *Clk.*
By CHAS. NASH, *Dep'y Clk.*

The defendant was regularly tried, and the verdict of the jury was against the defendant. Thereupon the def't by his counsel entered his motion to arrest judgment upon the alleged insufficiency of the said indictment, and set forth the following causes:

1st. The indictment does not aver any specific intent on the part
10 of the defendant to defraud the United States or any other party.

2d. The indictment is delusive, uncertain, double, and repugnant.

This motion coming on to be argued at this term, it occurred as a question whether the said motion was well taken and should be granted or not. On which question the opinions of the judges were opposed. Whereupon, on motion of the def't, by his counsel, that the point on which the disagreement hath happened may, during the term, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court to be finally decided,

It is ordered that the foregoing indictment and motion in arrest, which is made under the direction of the judges, be certified according to the request of the defendant by his counsel, and the law in that case made and provided.

Consequently the said judges hereby state the said questions and certify the same, and direct that the certificate hereof be entered of record.

(Signed) JOHN BAXTER. [SEAL.]
D. M. KEY. [SEAL.]

11 MIDDLE DISTRICT OF TENNESSEE:

I, Lewis T. Baxter, clerk of the circuit court of the United States for the district aforesaid, do hereby certify that the foregoing is a true and perfect copy of the record and proceedings had on an indictment No. 3690, United States vs. S. H. Pile, in this court, as the same remains of record and on file in this court.

Witness my hand and the seal of said circuit court at office in Nashville, Tenn., this 14th day of November, 1885.

[SEAL.] LEWIS T. BAXTER, *Clk.*

(Indorsement on cover:) No. 808. The United States, plaintiff, vs. S. H. Pile. M. Tennessee, C. C. U. S. Filed November 18, 1885.

Office Supreme Court, U. S.
FILED.
FEB 21 1889
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, PLAINTIFF,
vs.
S. H. PILE. } No. 206.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

BRIEF FOR THE UNITED STATES.

That at the time said affidavit, jurat, and certificate set out as aforesaid was falsely made and forged as aforesaid the said Daniel Malone was prosecuting a claim for a pension in the Department of the Interior, and the facts recited in said pretended affidavit, if true, were material in
9 said prosecution and that the said A. J. Mace was at the time of the false making and forging said affidavit, jurat, and certificate a justice of the peace of the said county of Fentress and subscribed his name to said jurat and certificate with the letters J. P., as above set out, intending thereby to denote his official character, and said false affidavit, jurat, and certificate were made and forged as aforesaid for the purpose aforesaid and to be used in said prosecution of said claim, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

ANDREW McCLAIN,
U. S. Att'y.

Filed Oct. 20th, 1882.

LEWIS T. BAXTER, *Clk.*
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ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

STATEMENT OF THE CASE.

On the 28th day of October, 1884, an indictment for a violation of section 4746 of the Revised Statutes against S. H. Pile came on for hearing in the circuit court of the United States for the middle district of Tennessee. On the 29th the jury found him guilty. The same day motions for a new trial and in arrest of judgment were made and overruled.

The defendant was sentenced to pay a fine of $250 and costs with order for execution, and that he be confined until the costs and fine were paid or discharged. On the 31st day of October, 1884, on application of the defendant, the execution of the judgment was suspended

until the 4th Monday of November, then next. On the 24th day of November, on motion of the defendant, the execution of the judgment was further suspended until the next term of the court. On the 23d day of April, 1885, which was at the succeeding term of the court, the following action was had:

> Upon sufficient grounds appearing to the court the judgment of fine and imprisonment pronounced in this cause at the last term, and the judgment rendered at the last term of this court on the motion in arrest of judgment overruling the same, are hereby set aside and for nothing held. And thereupon comes the defendant by his counsel before the circuit and district judges and moved that the judgment in this case be arrested, and for causes sets forth the following:
>
> 1st. The indictment does not aver any specific intent to defraud the United States or other party.
>
> 2d. The indictment is delusive, uncertain, repugnant, or inconsistent.
>
> And the motion coming on for argument before the honorable the judges aforesaid, and they being unable to agree as to whether the said motion is well taken or not, but having divided in opinion touching the same, at the request of the counsel of the defendant, a certificate of division is filed by the said judges, which is ordered to be made part of the record in this case. And no further steps will be taken in this case till the Supreme Court shall have adjudicated the question in said certificate set forth. The district attorney excepted to the order of the court setting aside the judgment of the court, rendered at the last term, overruling the *the* motion of defendant to arrest the judgment, and to the signing of division of opinion at this term of the court.
>
> It is ordered that the clerk certify the entire record of this cause to the Supreme Court.

On the hearing in this court, motion to dismiss for want of jurisdiction will be presented.

The court thereupon certified the following differences in opinion:

> The defendant was regularly tried, and the verdict of the jury was against the defendant. Thereupon the def't, by his counsel, entered his motion to arrest judgment upon the alleged insufficiency of the said indictment, and set forth the following causes:
>
> 1st. The indictment does not aver any specific intent on the part of the defendant to defraud the United States or any other party.
>
> 2d. The indictment is delusive, uncertain, double, and repugnant.
>
> This motion coming on to be argued at this term, it occurred as a question whether the said motion was well taken and should be granted or not. On which question the opinions of the judges were opposed. Whereupon, on motion of the def't, by his counsel, that the point on which the disagreement hath happened may, during the term, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court to be finally decided.
>
> It is ordered that the foregoing indictment and motion in arrest, which is made under the direction of the judges, be certified according to the request of the defendant by his counsel, and the law in that case made and provided.
>
> Consequently the said judges hereby state the said questions and certify the same, and direct that the certificate hereof be entered of record.
>
> JOHN BAXTER. [SEAL.]
> D. M. KEY. [SEAL.]

BRIEF OF ARGUMENT.

I.

ON THE MOTION TO DISMISS.

The power of the circuit court to certify this disagreement in opinion is granted by section 651 of the Revised Statutes, which is:

> Whenever any question occurs on the trial or hearing of any criminal proceeding before a circuit court upon which the judges are divided in opinion, the point upon which they disagree shall, during the same term, upon the request of either party, or of their counsel, be stated under the direction of the judges, and certified, under the seal of the court, to the Supreme Court at their next session; but nothing herein contained shall prevent the cause from proceeding if, in the opinion of the court, further proceedings can be had without prejudice to the merits. Imprisonment shall not be allowed nor punishment inflicted in any case where the judges of such court are divided in opinion upon the question touching the said imprisonment or punishment.

The power of this court to decide questions certified on divisions in opinion is found in section 697 of the Revised Statutes, and is:

> When any question occurs on the hearing or trial of any criminal proceeding before a circuit court, upon which the judges are divided in opinion, and the point upon which they disagree is certified to the Supreme Court according to law, such point shall be finally decided by the Supreme Court; and

its decision and order in the premises shall be remitted to such circuit court, and be there entered of record, and shall have effect according to the nature of the said judgment and order.

In both these sections, the only questions which can lawfully be certified are such as "occur on the hearing or trial of any criminal proceeding."

By the latter section this court can take cognizance only when the division is *certified according to law*.

If the court below had not power to certify under the first section cited, the division was not *certified according to law*.

The question then arises, did the questions certified occur on the *trial* or *hearing* of any legal proceeding in the cause?

The court below, on the 29th day of October, 1884, at the October term of the court, overruled motions for a new trial and in arrest of judgment, and passed final sentence on the defendant (Rec., p. 1). Judge Key alone was sitting at that time. Two days after this, judgment having been entered and presumptively its execution commenced, on motion of defendant's counsel execution of the judgment was suspended, and by a subsequent motion it was further suspended till the April term. On the 23d day of April, 1885, being the April term of the court, Judge Baxter sitting with Judge Key, the court as thus constituted set aside the judgment rendered at the previous term, and the judgment on the motion for arrest of judgment, and entertained a new motion in arrest of judgment, and certified this difference in opinion.

The statute requires that the point on which the judges disagree shall be certified "*during the same term.*"

It is claimed that after the expiration of the October term, the court had no power to set aside its judgment rendered at that term.

In Chitty's Criminal Law, vol. 1, page 722, the principle is thus stated:

> In case of misdemeanors, it is clear the court may vacate the judgment passed, before it becomes matter of record, and may mitigate, or pass another, even when the latter is more severe. And the justices at session have the same power during the sessions, because it is regarded as only one day; but they can not do it at any subsequent period, unless an adjournment be entered on the roll. And no court can make any alteration when once the judgment is solemnly entered on the record; but if any material defect appear on the face of it, the judgment may be reversed by writ of error.

In the case of the *Commonwealth* vs. *Henry Weymouth*, decided in 1861 (2 Allen, 144), the syllabus is:

> A judge of the superior court has power to revise and increase a sentence imposed upon a convict *during the same term of court*, and before the original sentence has gone into operation, or any action has been had upon it.

In *Miller* vs. *Finkle*, decided in 1853 (1 Parker's Crim. Rpts., 376), it is ruled by Parker, J.:

> I think it a safe rule to lay down that a court of criminal jurisdiction may vacate or modify a judgment at the *same term* at which it is pronounced, and before the sheriff has proceeded to execute it.

On page 377 it is ruled:

> This disqualification commences, as does the running of the time of the imprisonment, *from the moment of passing sentence.*

In the case of the *People* vs. *Duffy*, decided in 1849 (5 Barbour, 205), the syllabus is:

> After a person has been convicted under the acts relative to disorderly persons, and committed to prison in default of sureties for good behavior, and a record of conviction has been *made and signed* (though not filed), the committing magistrate has no power, acting singly, to discharge the prisoner, or to take a recognizance for his good behavior.
>
> The final commitment of the prisoner after the record of conviction has been made and signed, completely exhausts the power of the magistrate and ousts him of jurisdiction to take a recognizance.

In the case of the *People* vs. *Thompson* (4 Cal., 242), decided in 1854, which was a case in which a sentence was amended, Murray, C. J., delivering the opinion, ruled:

> The first sentence was perfectly legal and correct, and one to which the prisoner could not object, as it afforded him a longer time than the court might in its discretion have allowed. As to the second, it was perfectly competent for the court at any time before *final judgment signed* to amend its judgment, so that either sentence was good.

In the case of *Beale* vs. *The Commonwealth*, decided in 1855 (25 Penn. State, 20), Woodward, J., delivering the opinion, in speaking of the subject of the amendment of

a sentence, in which the word "hard" had been erroneously inserted before "labor," ruled:

> The sentence, therefore, must be reversed. It can not be amended. It might have been during the term, but not afterward.

The whole subject of reconsidering a sentence after judgment had been entered, is fully discussed and considered in the case of the *Commonwealth* vs. *Mayloy* (57 Penn. State, 295) which was decided in 1868. The doctrines relating to the subject were fully presented by able counsel, and discussed in exhaustive briefs. The case excited great interest, because in the county of Philadelphia it had been the practice of the criminal courts for a long period of time to pronounce sentence, and immediately, at the same term of the court, enter a rule to reconsider the sentence, and subsequently, at any term thereafter, before the full execution of the judgment, amend or modify it as to the court might seem just. It was set up in justification of the practice that it had become legal as a custom. The principles decided are thus stated in the syllabus:

> 1. It is the duty of courts to hear and determine according to law; beyond this the only express power to interfere in regard to convicts is the pardoning power, exclusively in the hands of the executive.
>
> 2. In the exercise of judicial power there are many things inherent in the courts, and exercisable without having been conferred by statute necessarily resulting from their own rules and uniform practice.
>
> 3. Practice is the form, manner, and order of conducting and carrying out suits or prosecutions in the courts through their various stages according to the

principles of law, and the rules laid down by the respective courts.

4. A custom to have the effect of law must have its origin from "time whereof the memory of man runneth not to the contrary."

5. The practice of courts may be established without written rules as its foundation, in some cases in a shorter period.

6. Customs become law from immemorial and universal acquiescence, either in a neighborhood or in the entire community to be affected.

7. The criminal courts of this State have not power when sentence is passed to enter a rule to reconsider their judgment, and at a subsequent term alter the sentence.

8. Prisoners tried within the last four days of the term cannot be deprived of their legal right to the allotted period to prepare and make their motion for a new trial. If the term ends too soon for this, motions may be made within an allotted period after the commencement of the succeeding term.

9. The court has power to remand and hold convicts for sentence as long as may be deemed necessary and advantageous to the ends of justice, and in the mean time may receive additional information as to what should be an appropriate sentence, where the court has discretion.

10. The convict has no right to be heard by the judge or court after sentence, especially after the term. He must resort to the executive.

Thompson, J., on page 295, states the question to be decided as follows:

> The single question to be decided is as to the power of the criminal courts of this county to reconsider a sentence, after the term at which it was

pronounced, and during the progress of its execution, and to modify or diminish its extent, the rule for which being entered at the time of sentence and within the term.

In reply to the question he says (pages 297 and 298):

This principle of finality is sufficiently apparent in our own reports, without the necessity of research. "There must be a time," it was said by our brother Strong, in *Mathers* vs. *Patterson* (9 Casey, 485), "when the power of a court to open its judgments, obtained adversely, ceases."

In England it ends with the term at which the judgment is signed. True, there is a reason for this which does not exist with us, arising from the peculiar manner in which the records are there made up and kept, but the rule of the English courts would seem to have been recognized as existing here: *Catlin* vs. *Robinson*, 2 Watts, 379; *Stephens* vs. *Cowan*, 6 *Id.*, 513. The finality of criminal judgments there rests not on identity of practice, although it does on principle. In *The Commonwealth* vs. *Beale*, 1 Casey, 11, the power to interfere after the term was positively denied by this court in an opinion by Woodward, J. The numerous authorities cited by the attorney-general and his colleague, English and American, which I need not notice more specially, establish the rule beyond a doubt. In fact, as suggested from the bench on the argument, the finality of the sentence might be a most material thing to the rights of the convict; for if he should desire to sue out a writ of error, a rule to reconsider existing might stand greatly in his way—a final judgment not appearing on the record.

But it has been argued, that the rule to reconsider within the term, is a modification *ipso facto*, of the rule which regards the finality of the sentence. The

difficulty is to find authority for the rule. A principle is often limited in its scope by other principles, and when so the operation is the result of law. But it is quite another thing to make a rule to control a principle. This is legislation. To go the extent of the argument would be to set aside the maxims of the law in regard to the finality of judgments and sentences. "*Interest reipublicae res judicata non rescindi,*" and "*res judicata veritate accipitur.*"

Every portion of the proceedings against offenders tends to a culmination in a final and irrevocable result. The steps are numerous and afford an opportunity to consider at most of them. In the first place a complaint must be made on oath—then a hearing before a magistrate—then a bill of indictment to be prepared by a public officer—then an examination into the grounds of complaint by a grand jury—process for witnesses, and counsel is allowed—a time is fixed for trial—limited peremptory challenges and for cause without limit are allowed; and on the trial the prisoner must be confronted by the witnesses. If convicted on a full trial, he is allowed time in which to move an arrest of judgment or for a new trial, and in this a review of all that has been done may be had; and finally, if he allege error in the record, he is entitled to a writ of error to carry his case to the court in the last resort. After this he may allege everything in his power to mitigate the sentence. No one can doubt that after all this the judgment or sentence pronounced, which is but the judgment of the law, was intended and ought to be final so far as the courts are concerned. With the execution of the sentence which follows courts have nothing to do, nor ought they.

In the case of *Albers* vs. *Whitney* (1 Storey's Repts., 310), decided in 1840, an application was made to amend

the judgment after the expiration of the term, by substituting, as one of the plaintiffs, James H. Alvers, for John H. Albers. Story, J., ruled that the right to amend was founded upon statute, and as the statute did not cover this case, the right of amendment after the judgment did not exist. In the discussion of the principle he states (page 312):

> It is plain that at the common law no judgment was amendable after the term at which it was entered. And amendments could be made in the process, pleadings, and proceedings only while the cause stood in paper and before judgment. The authority to amend, then, even in England, in cases of this sort, is dependent upon and limited by statute.

It is therefore maintained, as the power of the circuit court over the judgment in this case terminated with the term at which it was rendered, the opening of the judgment at a subsequent term to re-examine questions which arose before the judgment, was without jurisdiction, and the questions certified on division of opinion were not *certified according to law.*

II.

A.

The first question certified is:

> 1. The indictment does not aver any specific intent on the part of the defendant to defraud the United States, or any other party. (Rec., p. 4.)

The indictment is found in the record, pages 3 and 4. The very words "with intent to defraud" do not appear

in it. Neither do they appear in the statute (Revised Statutes, sec. 4746) which provides:

> Every person who knowingly or wilfully in anywise procures the making or presentation of any false or fraudulent affidavit concerning any claim for pension, or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions, or who knowingly or wilfully presents or causes to be presented at any pension agency, any power of attorney or other paper required as a voucher in drawing a pension, which paper bears a date subsequent to that on which it was actually signed or executed, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term not exceeding three years, or by both.

In the indictment it is set out that the defendant—

> With force and arms unlawfully did falsely make and forge, and cause to be made and forged, and did wilfully aid in the false making and forging * * * a certain paper writing purporting to be the affidavit of John Frogge and others. (Rec., p. 3.)

It does set out that Daniel Malone was prosecuting a claim for pension in the Department of the Interior. (Rec., p. 4.)

It sets out the affidavit, and that it was material. It alleges—

> That the said affidavit, jurat, and certificate were made and forged as aforesaid for the purpose aforesaid, and to be used in said prosecution of said claim. (Rec., p. 4.)

The statute does not require that an intent to defraud the United States, or any other person, shall constitute an essential element in the crime forbidden. To procure

knowingly or wrongfully the making or presentation of the false or fraudulent affidavit concerning any claim for pension is the whole of the crime. To do the act forbidden constitutes the crime whether the intent was to defraud the Government or to promote justice to the claimant. The use of fraudulent and unlawful *means* in the prosecution of a pension claim is the offense. The end sought to be reached might be ever so just, yet if an unlawful means was used to attain that end, the crime would be committed. A person might be clearly entitled to a pension, and every requirement of the law as to his *right* might be fully met. He might even be subjected to great delay, and possible wrong, at the hands of the Government because his pension was not granted; or, with the right on his side, he might not be able to prove the facts to establish it. They might be lost or out of his reach, yet, if to sustain his just claim he or his friends procure a false or fraudulent affidavit to supply the place of unattainable truthful evidence, he or they would be guilty, without any intent to defraud the United States.

With reference to averment of intent in statutory crimes, the principle is thus stated in 1st Bishop on Criminal Procedure, section 523:

> GENERALLY ON STATUTES.—Subject to this and kindred exceptions, the rule is, that if a statute creating an offense is silent concerning the intent, there need be no intent alleged in the indictment.

In section 524 it is stated:

> To repeat what has gone before, an act criminal in nature is prima facie evil in intent, and the intent need not be alleged unless the law has made it affirmatively or descriptively an element in the offense.

The foot-notes of the sections sustain the principle stated with abundant authorities.

Wharton on Criminal Law (Principles, Pleadings, and Evidence), section 364 sustains the well-known rule with reference to statutory offenses as follows:

> It is a well-settled general rule that in an indictment for an offense created by statute it is sufficient to describe the offense in the words of the statute, and if in any case the defendant insists upon a greater particularity it is for him to show that from the obvious intention of the legislature, or the known principles of law, the case falls within some exception to such general rule. But few exceptions to this rule are recognized.

Also in 1st Bishop's Criminal Procedure, section 611:

> Where a statute defines the offense which it creates it is ordinarily adequate, while nothing less will in any instance suffice to charge the defendant with all the acts within the statutory definition substantially in the words of the statute without further expansion.

In the case of *The United States* vs. *Simmons* (96 U. S., 362), Harlan, J., delivering the opinion, ruled:

> Where the offense is purely statutory, having no relation to the common law, it is, as "a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter." 1 Bishop, Crim. Proc., sect. 611, and authorities there cited. But to this general rule there is the qualification fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation

> against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense.

See also *United States* vs. *Britton* (107 U. S., 661).

The crime forbidden by this statute is complete without any intent to defraud. In *United States* vs. *Staats* (8 How., 45), in discussing the necessity of alleging felonious intent, Nelson, J., delivering the opinion, ruled:

> But, in cases where this felonious intent constitutes no part of the crime, that being complete under the statute without it, and depending upon another and different criminal intent, the rule can have no application in reason however it may be upon authority.

B.

The second question certified is whether—

> The indictment is delusive, uncertain, double, and repugnant.

It is submitted this question is not such a "single definite question" as is permitted by law to be certified.

See *United States* vs. *Waddell* (112 U. S., 81), *United States* vs. *Northway* (120 U. S., 329).

An analysis of the indictment as above set forth shows nothing to delude the defendant or any one else. It sets forth a claim for pension, and false and forged affidavit made and procured concerning that claim; the materiality of the affidavit, and that the purpose of the affidavit was to be used in the prosecution of the claim. The defendant could not well mistake the statute under which he was indicted. In pleading, repugnancy is—

> Two inconsistent allegations in one pleading. (1st Bishop's Criminal Procedure, sec. 489.)

The only two allegations that might appear to be repugnant are (1):

> For the purpose of obtaining and receiving and enabling Daniel Malone to obtain and receive from the United States a sum of money—

And (2):

> For the purpose aforesaid, and to be used in said prosecution of said claim. (Rec., p. 4.)

These two allegations are not repugnant, for a claim for pension is a claim for money against the United States, and the two modes of statement are but different descriptions of the same thing, both of which are true, and they are not inconsistent with each other. They both comply with the statutory description of the offense "concerning any claim for pension, or the payment thereof."

The charge of duplicity in the certificate of difference probably refers to the same sentences in the count. But, as has been maintained, the allegations for the purpose of prosecution of a claim, and for the purpose of obtaining money from the United States are not repugnant. They are at best only two different steps concerning a pension claim. If each by the statute is to be regarded as a separate offense, as they are the same grade of offense, and are both subject to the same punishment, it is not a fatal objection that they are joined in the same count.

In 1 Bishop Crim. Proc., sec. 453, it is stated:

> We have seen, that, if an offense may be committed by different means, and the pleader doubts which was employed in the particular instance, he may in one count charge its commission by all, and proof of any one will sustain the allegation. The limit to

this doctrine is that the means must not be repugnant.

In the case of *The State of Missouri* vs. *Murphy* (47 Mo., p. 275) the objection was that a count contained more than one offense in the same count. The court ruled:

> In regard to the second objection, the rule is that no more than one offense can be charged in one count, but there are exceptions. When a statute in one clause forbids several things, or creates several offenses in the alternative, which are not repugnant in their nature or penalty, the clause is treated in pleadings as though it created but one offense; and they may all be united conjunctively in one count, and the count is sustained by proof of one of the offenses charged (*State* vs. *Woodward*, 25 Verm., 616; 1 Bishop Crim. Proc., § 191; Bish. Crim. Law, §§ 274, 803, 810). The offenses are often so connected as to constitute but one transaction, as to assault and beat; to keep open a tippling shop and sell liquors on Sunday. And even felonies, created by different statutes, may be so connected so as to be chargeable in one count, as burglary and larceny, if the larceny is effected by means of the burglary.

In the case of *State* vs. *Woodward* (25 Vt., 618) the court charged:

> Suppose that we hold that either *selling* or *furnishing without a license* constitutes a separate and distinct offense, and this probably is a true exposition of the statute, yet the penalty is the same, and in such case both offenses may be charged in the same indictment, and should be charged in the *conjunctive*, as is done in this indictment.

G. A. JENKS,
Solicitor-General.

MAR 1 1887
JAMES H. McKENNEY
CLERK

No. 808.

THE UNITED STATES, Plaintiff.

vs.

S. H. PILE.

On a Certificate of Division in Opinion between the Judges of the Circuit Court of the United States for the Middle District of Tennessee.

Brief and Argument of JOHN P. MURRAY,

Of Counsel for Defendant.

IN THE SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1886.

THE UNITED STATES, PLAINTIFF,

vs.

S. H. PILE, DEFENDANT.

Certificate of division in opinion between the Judges of the Circuit Court of the United States for the Middle District of Tennessee.

S. H. Pile was indicted in the Circuit Court of the United States for the Middle District of Tennessee, at the October term, 1882.

The indictment is as follows:

The Grand Jurors of the United States and the District aforesaid, duly elected, empanneled, sworn and charged to inquire for the body of the district aforesaid, upon their oaths present that Stephen H. Pile and A. J. Mace, in the district aforesaid, on the 15th day of May, 1880, with force and arms, unlawfully, did falsely make and forge, and caused to be made and forged, and did willingly aid and assist in the false making and forging, for the purpose of obtaining and receiving, and of enabling Daniel Malone to obtain and receive, from the United States, a sum of money, a certain paper writing, purporting to be the affidavit of John Frogge and others, and jurat and certificate of A. J. Mace, J. P., appended thereto, which false and pretended affidavit, jurat and certificate is in the words and figures following, viz.:

"We, the undersigned citizens of Fentress county, Tennessee, and neighbors of Daniel Malone, post-office address, Pall Mall, Tennessee, upon our oaths do say that we have been acquainted with said Daniel Malone for twenty years, and that the condition of his leg at the date of his discharge, was a running sore upon his left leg, and each year, since 1865, said leg begins running in warm weather, and in cool weather will close again; and said leg totally disables him from manual labor; and we are not concerned or interested in the prosecution of this claim.

his
MATTHEW x PENNECUFF, SPENCER MORRIS,
mark.

his
JOHN x PENNECUFF, WILLIAM PENNECUFF,
mark.

JAMES FROGGE, JOHN FROGGE,

J. H. RAMSEY.

Sworn to and subscribed before me on the 15th day of May, 1880.

I certify that the above witnesses are entitled to full faith and credit, and the foregoing affidavit was read and explained to them before they executed their names thereto; and I am not concerned in this matter.

A. J. MACE, *J. P.*

That at the time said affidavit, jurat and certificate, set out as aforesaid, was falsely made and forged as aforesaid, the said Daniel Malone was prosecuting a claim for a pension in the Department of the Interior, and the facts recited in the said pretended affidavit, if true, were material in said prosecution, and that the said A. J. Mace was at the time of the false making and forging said affidavit, jurat and certificate, a justice of the peace of the said county of Fentress, and subscribed his name to said jurat and certificate with the letters "J. P." as above set out, intending thereby to denote his official character; and said false affi-

davit, jurat and certificate were made and forged as aforesaid for the purpose aforesaid, and to be used in said prosecution of said claim, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

ANDREW McCLAIN,
United States Attorney."

See Record, page 3.

The defendant was tried and convicted, and moved in arrest of judgment for the following causes:

First, the indictment does not aver any specific intent to defraud the United States, or other persons.

Second, the indictment is delusive, uncertain, repugnant or inconsistent, See Rec., page 2.

As to the sufficiency of the indictment, the opinions of the judges were opposed. The indictment is insufficient and the motion in arrest of judgment should have been sustained by the judges.

The indictment fails to aver an intent to defraud the United States or any one. The act of Congress under which the defendant was indicted, is as follows:

"Every person who falsely makes, alters, forges or counterfeits, or causes or procures to be falsely made, altered, forged or counterfeited; or willingly aids or assists in the false making, altering, forging or counterfeiting any deed, power of attorney, order, certificate, receipt or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money; or who utters or publishes as true, or causes to be uttered or published as true, any such false, forged, altered or counterfeited deed, power of attorney, order, certificate, receipt or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited; or who transmits to, or

presents at, or causes or procures to be transmitted or presented at any office or officer of the Government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited, shall be imprisoned at hard labor for a period of not less than one year nor more than ten years; or shall be imprisoned not more than five years, and fined not more than one thousand dollars."

Sec. 5421 Revised Statutes of United States.

It will be seen that the act of Congress under which he is indicted requires the act to be done with the intent to defraud the United States. The intent is the gist of the offense, and should be charged in the indictment, and the failure to do so renders the indictment defective, and is good ground for the arrest of judgment.

Wharton's Criminal Law, section 1496, holds that the indictment in such cases must aver an intent to defraud, and it must be proved as charged.

This must be done, although not required by the act creating the offense.

Intent to defraud must be clearly averred.

Wharton's Cr. Law, 297.

1st Chitty on Criminal Law, 231*b*, 233.

Archbold's Cr. Pleadings, 61, top page 50—side page.

The failure to aver the intent will not be aided by verdict. It is good ground in arrest of judgment.

Archbold's Cr. Pleadings, 61, page 50.

The intent to defraud must be clearly stated when the act creating the offense makes it necessary.

Bishop's Cr. Procedure, 523.

In all cases of forgery the intent to defraud must be charged and proved.

Bishop's Cr. Procedure, 420.

In the United States *v.* Carll, 105th U. S., 15th Otto, 611, which was an indictment for using forged and counterfeit and altered obligations and securities of the United States, the intent to defraud was averred, but it failed to aver that the defendant knew them to be forged. The indictment was held insufficient in law, and the judgment was arrested. In this case the indictment charged the offense in the language of the act creating it, but the Court held that guilty knowledge, being a necessary ingredient of the offense, it must be averred and proved.

U. S. *v.* Carll, 15 Otto, 611.

In this case the intent to defraud is made a necessary element of the defense by the act creating it, and it should most certainly be averred in the indictment. To make an affidavit as a mere form, not intending it to be used, is not a criminal making. The fraudulent intent is the gist of the offense, and it must be averred and proved.

In the case of the United States *v.* Crookshanks, 92 U. S. Reports, page 558 of the opinion, the Court says, every ingredient of which the offense is composed must be accurately and clearly stated. The facts that constitute the crime, not the evidence must be stated. Page 558.

Fraud is the chief element of the crime. No sane man would contend that the making of an instrument to guide others in the preparation of evidence, giving it as a mere form, is criminal. It is the intent to use, or have it used, fraudulently, that renders

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 206.

THE UNITED STATES,

Plaintiff,

vs.

S. H. PILE.

On a Certificate of Division in Opinion Between the Judges of the Circuit Court for the Middle District of Tennessee.

Brief of John P. Murray, of Counsel for Defendant, S. H. Pile, in Reply to the Brief of Hon. J. A. Jenks, Solicitor General for the United States.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1889.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, PLAINTIFF,
v.
S. H. PILE.
No. 206.

On a Certificate of Division in Opinion between the Judges of the Circuit Court of the United States for the Middle District of Tennessee.

BRIEF OF ARGUMENT IN REPLY.

I.

ON MOTION TO DISMISS.

It is well settled that this Court will only look to the certificate of division in opinion made under the direction of the judges. It is error to incorporate the entire record in the transcript for this Court.

See 7 Howard's Reports, 47; United States *v.* Briggs, 5 Howard, 208; Word *v.* Chamberlain, 2 Black, 430; White *v.* Turk, 12 Peters, 238; 6 Howard, 41; 7 Howard, 646; 18 Howard, 565; 16 Otto, 605.

While the cause is in progress, and until finally determined, the power of the court to set aside an order improperly made will not be denied. Here this order was made while the court still had jurisdiction of the person and subject-matter. The court recites in the order that it was made for satisfactory reasons appearing to the court. The presumption is that the court acted correctly and wisely.

The causes referred to by the Solicitor-General are causes where the court had parted with all jurisdiction of the person and subject-matter.

BRIEF OF ARGUMENT IN REPLY TO THE BRIEF OF ARGUMENT OF THE SOLICITOR-GENERAL ON THE QUESTIONS ARISING ON THE CERTIFICATE OF DIVISION OF OPINION.

The Solicitor-General is in error in assuming that the indictment is founded upon sec. 4746 Revised Statutes.

The indictment is founded upon sec. 5421 of the Revised Statutes, and is in the precise language of sec. 5421 Revised Statutes, except it uses the copulative conjunction "and" instead of the disjunctive "or" used in the Statute, and its failure to aver an intent to defraud the United States as required by said section.

The indictment avers as follows: "That Stephen H. Pile, with force and arms, unlawfully did falsely make and forge, and caused to be made and forged, and did willingly aid and assist in the false making and forging." * * *

A man could not cause to be done that which he himself had done, nor could he willingly aid and assist in doing that which he himself had done.

These charges are repugnant. The averment of one contradicts the other. They are delusive and uncertain. The indictment does not inform the prisoner whether the

Government intends to introduce proof to show that the prisoner himself did the act or whether he caused the act to be done, or whether he willingly aided and assisted in doing it.

JOHN P. MURRAY,
of Counsel for Deft., S. H. Pile.

Office Supreme Court U.S.
FILED,
FEB 21 1889
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, PLAINTIFF,
vs.
S. H. PILE.
No. 206.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

MOTION TO DISMISS.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, PLAINTIFF,
vs.
S. H. PILE.
No. 206.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

MOTION TO DISMISS.

And now at the hearing comes the United States by the Solicitor-General, and moves the court to dismiss this case for want of jurisdiction, and remand the record to the circuit court of the United States for the middle district of Tennessee, for the execution of the sentence which was pronounced by that court on the 29th day of October, 1884, on the ground that after the final judgment and the expiration of the term at which it was rendered, that court had no power to open up and set aside the judgment and entertain the motion in arrest of judgment, on which the court divided in opinion, nor to certify such division of opinion to this court for its decision.

G. A. JENKS,
Solicitor-General.

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130-284

130-284

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1279.

JOHN M. DAVIES AND ROBERT K. DAVIES, PLAINTIFFS IN ERROR,

vs.

CHARLES E. MILLER AND DANIEL G. ROLLINS, EXECUTORS OF CHESTER A. ARTHUR, DECEASED, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 12, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1279.

JOHN M. DAVIES AND ROBERT K. DAVIES, PLAINTIFFS IN ERROR,

vs.

CHARLES E. MILLER AND DANIEL G. ROLLINS, EXECUTORS OF CHESTER A. ARTHUR, DECEASED, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between John M. Davies and Robert K. Davies, plaintiffs, and Charles E. Miller and Daniel G. Rollins, executors, &c., of Chester A. Arthur, deceased, defendants, a manifest error hath happened, to the great damage of the said John M. Davies and Robert K. Davies, as is said and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid on the fourth Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, this first day of October, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed Oct. 1st, 1888.
E. HENRY LACOMBE.

2 [Endorsed:] 2731. United States Supreme Court. John M. Davies *et al.*, plaintiffs in error, *vs.* Charles E. Miller *et al.*, ex'rs, &c., defendants in error. Writ of error. Stanley, Clarke & Smith, 120 B'way, N. Y. city, attorneys for plaintiffs in error.

[Stamped:] U. S. circuit court. Filed Oct. 1, 1888. John A. Shields, clerk.

Due service of a copy of the within is admitted this 1st day of October, 1888.

STEPHEN A. WALKER, SR.,
U. S. Attorney, Att'y for Def'ts in Error.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to eighty-three, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of John M. Davies and Robert K. Davies, plaintiffs in error, against Charles E. Miller and Daniel G. Rollins, executors, &c., of Chester A. Arthur, deceased, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 8th day of October, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

[Seal of U. S. Circuit Court, South'n Dist. of New York.]

JOHN A. SHIELDS, *Clerk.*

3 *Summons for a Money Demand on Contract. Com. not Ser.*

Supreme Court, N. Y.

JOHN M. DAVIES & ROBERT K. DAVIES, under Firm Name of John M. Davies & Co., Plaintiffs,
against
CHESTER A. ARTHUR, Collector of Customs for the Port & District of New York, Defendant.

To Chester A. Arthur, collector, &c.:

You are hereby summoned and required to answer the complaint in this action which *will* filed in the office of the clerk of the supreme court, at the county court-house, and to serve a copy of your answer to the said complaint on the subscriber, at his office, No. 59 Liberty St., within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiffs in this action will take judgment against you for the sum of five hundred dollars, with interest from the ninth day of July, one thousand eight hundred and seventy-three, besides the costs and disbursements of this action.

Dated Nov. 20, 1873.

GEO. S. SEDGWICK,
Plaintiffs' Attorney, 59 *Liberty St.*

4 (Endorsed:) 2731. Supreme Court, N. Y. John M. Davies *et al. vs.* Chester A. Arthur, collector, &c. U. S. attorney's office. Received Nov. 29, 1873. Rec'd Nov. 20, 1873.

5 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Chester A. Arthur, defendant, by John M. Davies & *al.*, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 16th day of February, 1874, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Nathan Clifford, Esquire, associate justice of the Supreme Court of the United States, the 9th day of February, in the year one thousand eight hundred and seventy-four.

[L. S.] KENNETH G. WHITE, *Clerk.*

GEORGE BLISS,
Defendant's Attorney.

6 (Endorsed:) 2731. U. S. circuit court. Chester A. Arthur *ads.* John M. Davies & *al.* Copy. Certiorari. George Bliss, defendant's attorney. Sir: Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, Feb. 9, 1874. Yours, &c., George Bliss, defendant's attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, Feb. 9, 1874. Geo. S. Sedgwick, plaintiffs' attorney.

U. S. Circuit Court, Southern District of New York.

JOHN M. DAVIES & ROBERT K. DAVIES *et als.*, Plaintiffs, — CHESTER A. ARTHUR, Collector, &c., Defendant.

SIR: Please take notice that within is plaintiffs' bill of particulars of *his* claim against the above-named defendant.

Names of importers.	Description.	Place whence imp't.	Names of vessels.	Date invoice.	Date of entry.	Excess.	Paid.	Date protest.	Date appeal.	Date Secretary's decision.
John M. Davies & Co.	[D] J, 8281, silk & cotton drawers.	Liverpool.	Java	1873. July 18	1873. July 31	8 25	1873. July 31	1873. Aug. 5	1873. Aug. 5	1873. Aug. 23
	[D] J, 8275, silk & cotton drawers.	" √	Russia	" 9	" 24	31 60	July 23	" "	" "	" "
	[D] J, 8274, silk & cotton la'ns.					12 50				
	[D] J, 8266-'67, worsted cuffs.	" √	Algeria	" 4	" 17	79 29	July 17	" 23	" 23	Nov. 3
	[D] J, 58268, cardigan jackets.	" √	"	" "	" "	64 35	" "	" 23	" 23	" "
	[D] J, 8282, worsted cuffs.	" √	Java	" 18	" 31	8 55	" 31	" "	" "	" "
	[D] J, 3286, worsted cuffs.	"	Scotia	Aug. 1	" 13	4 05	Aug. 13			
	& cardigan jackets	"	Scotia	" 1	Aug. 14	47 70	Aug. 14	" "	" "	Sept. 10
	[D] J, 8995, silk & cotton shirts.	"	Java	" 23	Sept. 4	21 52	Sept. 4	Sept. 3	Sept. 8	Oct. 29
	[D] J, silk & cotton shirts & drawers.	"	Cuba	" 30	" 11	20 52	" "	" 17	" 17	Sept. 30
						298 33				

Suit brought Nov. 20, '73.

GEO. S. SEDGWICK,
Att'y for Pl'ff-.

8 (Endorsed:) 2731. U. S. circuit court, southern district of New York. John M. Davies *et al.*, plaintiffs, *vs.* Chester A. Arthur, collector, &c., defendant. George Bliss, Esq., defendant's —. Received Jan'y 2, 1874. U. S. attorney's office. George S. Sedgwick, plaintiffs' attorney. Due service of bill of particulars, of which within is copy, admitted this — day of ——, 187–.

9 THE UNITED STATES OF AMERICA:

Circuit Court of the United States for the Southern District of New York, in the Second Circuit, of the April Term, in the year one thousand eight hundred and seventy-three.

JOHN M. DAVIES & ROBERT K. DAVIES

vs.

CHESTER A. ARTHUR, Collector, &c.

The plaintiffs in this suit come into court and, by George S. Sedgwick, their attorney, give the court now here to be informed that heretofore, to wit, on the 20th day of November, 1873, last past, this action was commenced in the supreme court of the city of New York, according to the laws of the State of New York and the rules and practice of said court, in favor of the said plaintiffs against the defendant herein upon the causes of action hereinafter set forth and the summons therein filed with the clerk of said court; that the defendant afterwards, by his attorney, George Bliss, Esquire, duly appeared in said action, and thereupon, on the 9th day of February, in the year one thousand eight hundred and seventy-four, the said action was duly removed by writ of certiorari for further prosecution into this court, according to the act of Congress in such case made and provided, and the clerk of the said court did thereupon return the said writ with the said summons and duly filed the same in this court; which allegations the defendant admits to be

10 true.

Wherefore let the further proceedings and trial in this action be continued in this court.

And the said plaintiffs, by their said attorney, complain of said defendant of a plea of trespass on the case for promises, for that whereas said defendant, on 9th day of July, eighteen hundred and seventy-three, at New York city, in the district aforesaid, was indebted to said plaintiffs in the sum of five hundred dollars, lawful money of the United States of America, for duties on merchandise, to wit, silk & cotton drawers, worsted cuffs, Cardigan jackets, and silk and cotton shirts, imported into and entered at the collection district of the United States for the city of New York on or about July 17th, 24th, 31st, August 14th, and September 4th, in the year one thousand eight hundred and seventy-three, in the following vessels, to wit, Java, Rupia, Algeria, Scotia, and Cuba, from Liverpool, unlawfully demanded, exacted, and received, at said New York city, by the said defendant, the collector of the customs for said district, under color of a law of the United States for the collec-

tion of duties on imports, and paid by the said plaintiffs under protest and appeal in writing in due form of law.

And, being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money when he, said defendant, should be thereunto afterwards requested.

11 And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiffs in the further sum of five hundred dollars, lawful money of the United States of America, for money before that time lent and advanced by said plaintiffs to said defendant and at the special instance and request of said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs; and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned when he should be thereunto afterwards requested.

Nevertheless, said defendant (although often afterwards requested so to do) has not paid said sums of money or any or either of them or any part thereof to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs has hitherto refused and still does refuse, to the damage of the said plaintiffs of five hundred dollars, and therefore the said plaintiffs bring suit, &c.

GEORGE S. SEDGWICK,
Attorney for the Plaintiffs, 11 *Pine St.*

12 (Endorsed:) 2731. U.S. circuit court. John M. Davies *et al.* *vs.* Chester A. Arthur. Declaration. To George Bliss, Esq., def't's att'y. Sir: Please take notice that a rule has been entered in the book of common rules, in the office of the clerk of this court, at the city of New York, requiring the defendant to plead to the declaration in twenty days after the service of a copy thereof and notice of said rule on his attorney, or judgment, &c. New York, January 8th, 1876. Geo. S. Sedwick, attorney for plaintiffs, 11 Pine street. Jan. 8.

13 *Plea.*

United States Circuit Court, Southern District of New York.

CHESTER A. ARTHUR *ads.* JOHN M. DAVIES & *al.* } 2731.

And the said defendant, Chester A. Arthur, by George Bliss, his

attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country; and the said plaintiffs do the like, &c.

GEO. BLISS,
Defendant's Attorney.

To Geo. S. Sedgwick, Esq., plaintiff's attorney.

(Endorsed:) 2731. U.S. circuit court. Arthur *ads.* Davies —. Plea. Geo. Bliss, attorney for defendant. Due service of a copy of within is hereby admitted. New York, Jan. 20, 1876. Geo. S. Sedgwick, pl'ffs' att'y. You will please take notice that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York. New York, Jan. 20, 1876. Yours, &c. Geo. Bliss, defendant's attorney. To Geo. S. Sedgwick, Esq., plaintiffs' attorney.

14 United States Circuit Court, Southern District of New York.

JOHN M. DAVIES & ANO
vs.
CHESTER A. ARTHUR and a Number of Other Actions. } N. S. 2731.
&c., &c.

On reading and filing the annexed affidavit of Macgrane Coxe, duly sworn to the 10th day of January, 1887, and the annexed exemplified copy of letters testamentary, granted by the court of common pleas for the city and county of New York to Charles E. Miller and Daniel G. Rollins, on the 4th day of December, 1886, on motion of Stephen A. Walker, United States attorney and attorney for said Chester A. Arthur, it is ordered that the said Charles E. Miller and Daniel G. Rollins, executors of the last will and testament of said Chester A. Arthur, deceased, be, and they hereby are, substituted as parties defendant in each and every of the above-entitled actions in the place of said Chester A. Arthur, deceased, and that said actions stand revived and continued as against them.

(Signed) WILLIAM J. WALLACE.

15 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Thursday & Friday, the 12th & 13th days of April, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable E. Henry Lacombe, circuit judge.

JOHN M. DAVIES *et al.*
vs.
CHARLES E. MILLER *et al.*, Executors, &c. } N. S. 3731.

Now come the plaintiffs, by Stephen G. Clarke, Esq., their attor-

ney, and move the trial of this cause; also come the defendants, by Macgrane Coxe, Esq., ass't U. S. att'y, their attorney; thereupon a jury is empannelled and the cause proceeds to trial. After hearing the evidence of the parties & the argument of counsel the jury, by direction of the court, find a verdict for the defendant. A stay of sixty days is granted by the court in which the plaintiffs may make a case, with leave to turn the same into a bill of exception.

JOHN A. SHIELDS, *Clerk.*

16 *Judgment.*

United States Circuit Court, Southern District of New York.

JOHN M. DAVIES & *al.*
vs.
CHARLES E. MILLER & *al.*, Executors, &c.

The issues in this action having been brought on for trial before Mr. Judge Lacombe and a jury, at a circuit court of the April term, 1888, and the issues having been tried and a verdict for the defendants having been duly rendered on the 12 and 13 days of April, 1888, and their costs having been adjusted at $48.85:

Now, on motion of Stephen A. Walker, United States attorney, for defendants, it is adjudged that the defendants have judgment against the plaintiffs upon the issues in this action, and that they recover the sum — $—, their taxed costs, and have execution therefor.

Judgment signed this first day of October, 1888.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) 2731. United States circuit court. John M. Davies & ano. *vs.* Chas. E. Miller & ano., executors, &c. Judgment-roll. Stephen A. Walker, United States attorney, attorney for defendants. Costs, $48.85. U. S. circuit court. Filed Oct. 1, 1888. John A. Shields, clerk.

17 *Plaintiffs' Bill of Exceptions.*

United States Circuit Court, Southern District of New York.

JOHN M. DAVIES and ROBERT K. DAVIES
vs.
CHARLES E. MILLER and DANIEL G. ROLLINS, Executors of Chester A. Arthur, Deceased.

Afterwards and on the 12th day of April, 1888, at a stated term of this court, held in the city of New York, the issues in this case came on for trial before the Honorable E. Henry Lacombe, a judge of this court, and a jury duly empaneled to try the issues therein.

The plaintiffs, to maintain the issues on their part, put in evidence entries made by him in July, August, and September, 1873; also the accompanying invoices.

Plaintiffs also introduced evidence tending to show that the importations embraced hosiery, drawers, etc., made on frames, of worsted or of merino, to wit, shirts, drawers, and stockings worn by men, women, and children; that duty was paid upon these articles at 50 cents per pound and 35% ad valorem; that the invoices also cover silk and cotton pants or drawers and silk and cotton gloves, made on frames, the same being articles worn by men, women, and children, in which silk was the component material of least value, and that duty was paid at the rate of 60% on such goods; also that appeals were duly made and suit brought in due time.

18 Plaintiffs then offered in evidence seven protests applicable to the entries in evidence; to the admission of which counsel for the defendants objected on the ground that the protests were filed with the collector prior to the date of liquidation as stamped upon the entry.

The COURT: In order to enable the plaintiffs to properly present *his* side of the case I shall admit this now, giving the defendants an exception, and rule upon the effect of the protest hereafter. That will save all your rights.

The protests were then marked in evidence.

Plaintiffs then read in evidence the following report as to the protest filed in respect to the Java, of July 31, 1873, viz:

CUSTOM-HOUSE, NEW YORK,
COLLECTOR'S OFFICE, *Oct.* 30, 1873.

SIR: I submit the appeal of Mess. J. M. Davies (No. 12195) from the decision of this office assessing duty at the rate of 50 cents per per pound and 35% ad val., less 10%, on certain worsted cuffs imported by that firm, per Java, July 31, 1873. The app'r returns the goods knit goods, woolen hosiery, value over 80 cents per lb.

Referring to section 2 of the act of March 2, 1867, and Treasury decision October 26, 1869, I have the honor to report that the requirements of the 14th and 15th sections of the act approved June 30, 1864, have been complied with by the appellees.

The appeal is enclosed herewith; also protest.

Very respectfully, your obedient servant,

C. P. CLINCH,
Ass't Collector.

Hon. Wm. A. Richardson, Secretary of the Treasury.

And the reply of the Department affirming the decision of the collector as follows:

19 "TREASURY DEPARTMENT,
WASHINGTON, D. C., *November* 3, 1873.

SIR: Messrs. J. M. Davies & Co. have appealed (941–B) from your assessment of duty at 50 cents per pound and 35% ad valorem, less 10%, on certain worsted cuffs imported by them per Java, July 31, 1873. It appears from the report upon the appraiser's return that

the goods were knit goods, woolen hosiery, value over 80 cents per pound. Duty was assessed thereon as above under the provisions of section 2 of the act of March 2, 1867, and Department decision of October 26, 1860. Your decision is hereby affirmed.

Very respectfully, J. F. HARTLEY.

By order Secretary of the Treasury.

C. A. Arthur, Esq., Collector, New York."

Similar reports as to each of the other entries in the case with the reply of the Department affirming the action of the collector were then also put in evidence.

Plaintiffs then called WILLIAM H. NORTHRUP, who, being duly sworn, testified in substance as follows:

I was a clerk in the custom-house between March 4, 1867, and June 7, 1881; had charge of the protest and appeal department; it was my duty to receive and record protests and appeals; receive the summonses for the collector and record them and send them to the district attorneys. Along about April, 1879, I reported on all the protests and appeals to Washington. Both copies of the protest were stamped together at the time they were received; the second copy of the protest was forwarded with the appeal to Washington. I also examined certified statements for refunds in cases where protests and appeals had been made. The statement gave the title of the suit, the number of the suit, the merchandise on which the refund was made, the date of payment, the name of the vessel, where from, the date of liquidation, the date of protest, the date of the appeal, the number of the appeal, the amount paid, the excess of duties, the amount of interest, and the date of the Secretary's decision on the appeal, if there had been any. These particulars were carried through from each importation embraced in the respective statements during the time I was in office. In practice there was no distinction made by the officers of the customs as to protests being filed in time, as to whether it was filed before or after the date of the liquidation stamped on the entry.

Witness was then asked if the same practice continued until the fall of 1873.

Counsel for defendants objected, and the court sustained the objection, so far as it called for testimony as to practice subsequent to September, 11, 1873, and plaintiffs, by their counsel, then and there duly excepted, and the exception was allowed.

Witness was then asked to state what the practice was, in this respect, at the custom-house from the fall of 1878 to June 7, 1881, when he left the custom-house.

Counsel for defendants objected. The court having sustained the objection, the counsel for the plaintiffs excepted, and the exception was duly allowed.

Between 1867 and the fall of 1873 there was a large number of protests filed before liquidation.

Being cross-examined by defendants' counsel witness testified:

21 During that time I probably examined a thousand or two protests with the view to ascertaining the date of their filing with reference to liquidation. About two-thirds of the entries, with regard to which such thousand or two protests were filed, I examined with the view to finding out the date of liquidation during that period. They run right along, so that the average was about two-thirds of everything that I examined. From my recollection of what work I had done previously and the way the protests were running and the examinations I was making and of the statements I arrive at that conclusion—that two-thirds of the protests were prior to liquidation. Away back in 1867 the question as to the materiality of the filing of the protests before or after liquidation, with regard to the validity of the protests, was talked over by the customs officers and Treasury officials. The question was gone over by them and they all agreed that that was not the object of the law, to confine a man to within ten days of the date of liquidation—that is, applying it to the date of liquidation. After that time it was considered a settled fact. There were probably six hundred or seven hundred thousand entries between 1867 and 1873, but there was not probably a quarter of those—perhaps not a sixteenth—where there was a protest and appeal. All the protests passed through my hands.

Direct examination:

Witness was then asked to state what proportion or about what proportion were filed before liquidation.

22 The court excluded the question, because it appeared from the cross-examination of the witness that any statement of his as to the particular proportion of those filed before and after liquidation would be mere guess-work on his part. Exception taken by plaintiffs' counsel, and the exception was duly allowed.

There were a large number of protests filed before liquidation while I was in the custom-house. I have a recollection of the cases in which protests were filed after liquidation. When protests were filed after liquidation there had, as a rule, been some change in the rate of duty upon the liquidation from that fixed upon the entry. During the time I was at the custom-house the first deputy was E. C. Banfield; the next, S. G. Clarke; the next was Mr. Dudley S. Phelps. Gen. George W. Palmer was there when I went out, in 1881. Mr. Banfield and Mr. Palmer are both dead.

Cross-examination by defendants' counsel:

I know from an examination of the entries and invoices and protests that, as a matter of practice at the custom-house, where the protests were filed after the date of the liquidation it was where there had been a change from the original liquidation made upon the entry. I had charge of the entries at times; I had probably two or three thousand entries in my office the whole time; I had a big

case full of them the whole time; in fact, I had two cases full—two large cases full of entries. I had them at one time during 1867 and 1869, I think it was, when I got up the entries and invoices, and made thorough examinations of them as to the protests and
23 appeals and put them in jackets and put them away, and had them prepared and put in shape so that if the district attorney called on me for a case I could give him the whole case complete; I would send it up to him. I got them in shape so that I could take them right out of my cases and take them to the district attorney's office. I had hundreds of cases just in that way—where there were maybe twenty or thirty entries in each suit. Then when I began to report on the appeals I had a large case full of entries and invoices as well, and that was separate from the case that I had where I prepared the cases of protests and appeals for the district attorney's office. I sent for the entries myself to send them to the district attorney's office; to prepare them for the district attorney for suit; to prepare reports for the solicitor of the Treasury and report on the protests and appeals.

I guess there were as many as six thousand protests filed in the custom-house in 1873 and about as many in 1871 and 1872; in 1874 there was a large number, I guess as many as twenty-two thousand; that was the time that the French franc question came up. During the period from 1867 to 1873 I guess I had two or three thousand entries that I could have sent to the district attorney if he had called upon me for them. I received the protests at the custom-house, stamped them, entered them in the protest appeal book, and placed them on file. The examination of the entries in my possession, with the view of finding out the date of liquidation as compared with the date of the filing of the protest, was devolved upon me from
24 the time of my going into the custom-house; I always had it to do. The date of the liquidation was stamped on the back of the entry, "Custom-house, liquidated," and the date was underneath. The word "liquidated" was in large letters; then under that was the date of liquidation. If there had been a change made from the original liquidation it would appear right on the face of the paper. The name of the vessel was on the back of the entry and on the face of the entry up at the top. The date of the protest I found from the protest itself. The date of the appeal was on the appeal and the number of the appeal was endorsed upon it. In the course of business stamps upon the backs of the entries and invoices were taken to be the official records of the acts that were done by the different officers as to these papers.

Plaintiffs then called EVERETT BROWN, who, being duly sworn, testified in substance as follows:

I was a clerk at the custom-house in this city, in the collector's office, between December, 1884, and August, 1886, in the protest and file room, engaged in the receipt, stamping, recording, and filing of protests and appeals, and in the examination of entries and invoices in connection with them, and reporting on the same to the collector.

Witness was then asked if he was able to state, during the time he had testified to, what the practice was in reference to protests filed before liquidation being treated in the custom-house and by the department as filed in time.

25 Counsel for defendants objected to the question as immaterial. The court sustained the objection, and plaintiffs' counsel duly excepted, and the exception was allowed.

Witness then stated that he could state what that custom was, if permitted to.

Plaintiffs then called JOHN G. VOORHEIS, who, being duly sworn, testified in substance as follows:

I was entry clerk in the office of the collector of customs of New York from 1864 to 1869. The practice with regard to fixing the rates of duty upon entries at the time the entry was made was the same as it is at the present time. The entries were prepared by the merchant or brokers, and the invoices were presented to us, and we assessed the duty according to the articles named in the invoices and upon the face of the entry, and according to the decisions of the Department as to the rates of duty applicable to such entries. Before we passed the entry we required the rate of duty stated upon it, and for which a deposit was made, to conform to the current decisions of the Department or the laws of Congress, as they were understood. Since I ceased to be an entry clerk I have been a broker at the custom-house and constantly engaged in passing entries, and this same practice continued from 1869 to 1873.

Witness was then asked if the same practice continued from 1873 to the present time. To which question he replied that it did.

26 Defendants' counsel made a motion to strike out the evidence as to the period after 1873 as immaterial. The court granted the motion, and plaintiffs, by their counsel, duly excepted, and the exception was allowed.

The practice has been the same ever since I entered the service at the custom-house—that is, in the passage of entries and the assessing of duties.

Plaintiffs then called AMOS A. SMITH, who, being duly sworn, testified in substance as follows:

I am a custom-house broker, and have been since 1863. It was a part of my business as custom-house broker to file protests, where required. I filed a great many. I acquired the practice during the time I was at the custom-house as to protests being filed within time and within the provisions of the act of 1864. There was no difference in the practice as to protests being filed before or within ten days after liquidation. During that time I never had a protest rejected by the custom-house or by the Treasury Department as out of time because filed before liquidation. If a protest is deemed out of time by the Department they did not, as a rule, entertain the appeal.

Witness was then asked, having stated what the practice was as to protests being filed before or within ten days after liquidation from 1864 to 1873, what the practice was from 1873 down to 1878.

Counsel for the defendants objected to the question as immaterial, and the court excluded the question, and plaintiffs, by their counsel, duly excepted, and the exception was allowed.

27 The same practice prevailed in 1878 and 1879 as prevailed prior to 1873. From 1879 the protests that I had were entertained, whether filed prior to liquidation or after; cannot say whether it was the same all through 1879.

Witness was then asked if the practice was the same from 1880 to 1885.

To this question counsel for defendants objected as immaterial and incompetent. The court excluded the question, and plaintiffs, by the counsel, excepted, and the exception was allowed.

Being cross-examined by defendants' counsel witness testified:

Between 1864 and 1873 I filed a great many protests before liquidation. There may have been a change in the practice of the custom-house in 1878 or 1879, but they continued the same appeal from protests prior to liquidation. Up to 1874 the practice was to file protests without regard to time prior to liquidation. I think there was a change in the practice in 1878 and 1879.

Redirect examination by plaintiffs' counsel:

Witness was asked what the action of the Department was in 1878 and 1879 in respect to entertaining the protests which he filed as in time.

Defendants' counsel objected to the question as incompetent and immaterial. The court sustained the objection, and plaintiffs' counsel then and there duly excepted, and the exception was allowed.

28 Plaintiffs then called as a witness DUDLEY F. PHELPS, who, being duly sworn, testified in substance as follows:

I was deputy collector of customs in charge of the law division of the custom-house from July 5, 1872, to March 1, 1879. That department had charge of the protests and appeals and of everything connected with the law and seizure. The refund statements went through my division under my supervision. It was a part of my official duty to pass upon the sufficiency of protests and appeals; was familiar with the action and practice of the custom-house and Treasury Department with respect to the question of whether protests filed before liquidation were in time or not. In 1872 and down to the fall of 1873 protests were treated as valid if they were filed at any time subsequent to entry and prior to a date ten days after liquidation, and that was the practice at the time I entered the custom-house.

Witness was then asked to state whether or not there was any change in that practice from the fall of 1873 down to the commence-

ment of the year 1878. To this question defendants' counsel objected as immaterial and incompetent. The court sustained the objection, and plaintiffs' counsel excepted, and the exception was duly allowed.

There was a change in the practice in September, 1878, for at that time my recollection is that no statements were sent forward. If any were forwarded after that time, then there was a change. My recollection is that the attorneys having these case held back
29 their cases for the time being, and, I think, until I left the office very few statements were forwarded. The statements are not made up there by the collector of his own motion, but when a request is made by attorneys for the plaintiff. That is my recollection now. I have not investigated it very carefully, but that is my recollection, that after the issue of that circular that the lawyers for some time refrained from making statements and from having certified statements sent on. A change was ordered. I do not think that order was recalled while I was deputy collector. (Witness shown paper.) I have no doubt that that is the order of the Department which I have referred to.

Plaintiffs' counsel then read it in evidence, being Department order, synopsis, 3730, for the year 1878, dated September 30, 1878.

"TREASURY DEPARTMENT, *Sept.* 30, 1878.

SIR: The Department is in receipt of your letter of the 24th instant, in which you state that you are in receipt of a copy of the opinion of Chief Justice Waite in the case of the United States *vs.* Watt *et al.*, in which it is held that an appeal from the decision of the collector of customs as to the rate and amount of duty chargeable in any given importation of merchandise must be filed subsequently to the liquidation of the entry in order to be valid. You state that the practice of your office has been based upon the opinion of the court in Marriott *vs.* Bonne, 9 Howard's Reports, 619. In regard thereto I have to state that the decision in the case last cited
30 was made under the act of February 26, 1845, which provides as follows:

Nor shall any action be maintained against any collector to recover the amount of duty so provided under protest, unless the said protest was made in writing and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof. Under these circumstances the court recognized as valid a protest filed before the final adjustment of duties.

The present statute upon the subject, found in section 2931, Revised Statutes, requires the protest to be filed within ten days and the appeal within thirty days after the ascertainment and liquidation of duty by the proper officers of the customs.

Under this statute it is held, in the case of the U. S. *vs.* Watt, that the appeal to be valid must be filed subsequently to the liquidation of the entry.

The Department recognizes this rule as a proper construction of the law now in force. This rule, moreover, would seem to be a proper one, because, until the entry has been liquidated which constitutes the adjustment of duties by the collector, there is no official act of the collector performed against which a protest and appeal may properly be taken.

The practice of your office in regard to recognizing protests and appeals will conform to the views thus laid down.

Very respectfully, H. F. FRENCH,
Assistant Secretary.

Collector of customs, New York."

31 Plaintiffs then called as a witness WILLIAM HART, who, being duly sworn, testified in substance as follows:

I am a custom-house broker and have been since 1858. I know the whole practice of the custom-house in respect to matters connected with the entry and passage of goods through the custom-house. I became familiar with the requirements of practice of the custom-house as to protests during that period and have filed a great many myself. There was no difference in the practice from June, 1864, down to September, 1873. We filed protests at any time it was convenient to do so prior to liquidation or within ten days after liquidation of the entry. I never had an appeal based upon such protests rejected by the Department and never knew of one being rejected.

Witness was then asked to state what proportion of protests he had filed before liquidation. Defendants' counsel objected to the question as incompetent and immaterial, the court sustained the objection, and plaintiffs' counsel duly excepted, and the exception was allowed.

I know of no change in the practice from 1873 down to 1886, when the Secretary issued an order that no protest should be received until after the liquidation of the entry.

Being cross-examined by plaintiffs' counsel, witness testified:

I don't think that there was any change in the practice in 1878 and 1879. I made my protests in the same way and they were accepted. The collector never objected to any of them. I never changed my practice. There was a rule; nothing more.

32 Plaintiffs then called as a witness EDWARD JORDAN, who, being duly sworn, testified in substance as follows:

I am an attorney and counsellor at law. From 1861 to 1869 I was solicitor of the Treasury of the United States. The practice was, from 1864 and as long as I remained connected with the Department, to recognize the validity or the timeliness of protests made at any time before the liquidation of the entries as well as if made after liquidation and within ten days after it.

Being cross-examined by defendants' counsel:

I was not acquainted with the practice prior to 1864, except from knowledge gained by inspection of documents and the supervision of cases; not from immediate contact with the subject. My impression is that the same rule prevailed from 1867 onward. I drafted the bill of 1864.

Plaintiffs then called as a witness CHARLES BLEIDORN, who, being duly sworn, testified in substance as follows:

I have been a custom-house broker since May, 1870, and have been familiar with the practice at the custom-house in respect to entries and filing protests. In the year 1870 to the fall of 1873 the entries were allowed, until the decision was given, before liquidation, and as long as the protests had been filed the protests were regarded as in time and entertained. I can state the proportion of the protests filed by myself.

Witness was then asked to state what proportion of the protests filed by himself in behalf of his customers were filed before liquidation. Defendants' counsel objected to the question as immaterial, the court sustained the objection, and plaintiffs' counsel duly excepted, and the exception was allowed.

33

Plaintiffs then called as a witness HUGH J. BEGLY, who, being duly sworn, testified in substance as follows:

I am an attorney-at-law. From the beginning of 1862 to 1873 I was managing attorney in the office of Webster and Craig. Claims against the Government in which protests were required to be filed at the custom-house was their principal business. They did a very large business.

Witness was then asked if he was able to state what proportion of protests that were filed at the custom-house in the years 1864 to 1873 were filed from the office of Webster & Craig. To this question defendants' counsel objected as immaterial, the court sustained the objection, and plaintiffs' counsel excepted, and the exception was allowed.

Witness then testified that the protests which were filed in the years 1864 to 1873 were prepared under his supervision; that the practice at the custom-house during those years was to accept protests filed before the date stamped on the entry. He then stated that the above testimony was only in reference to practice in their own office.

Defendants' counsel then made a motion to strike out the above testimony as immaterial, the court granted the motion, and plaintiffs' counsel excepted, and the exception was allowed.

34 Witness was then asked to state what the practice was as to protests filed from his office. Defendants' counsel objected to the question as immaterial, the court sustained the objection, and plaintiffs' counsel excepted, and the exception was allowed.

Witness was then asked to state what proportion of the protests filed by the office of Webster & Craig from 1864 to 1873 were filed prior to the liquidation of the entry. Defendants' counsel objected to the question as immaterial, the court sustained the objection, and plaintiffs' counsel duly excepted, and the exception was allowed.

Plaintiffs then called as a witness WILLIAM B. COUGHTRY, who, being duly sworn, testified in substance as follows:

I am an attorney. I was managing clerk and junior clerk with Mr. Douglass from about the beginning of 1862 to the fall of 1873. His business was largely in respect to custom-house matters—the filing of protests and the bringing of suits. I either filed them or they were filed under my direction in the office. I knew the general practice at the custom-house between 1864 and 1873. It was to receive as timely all protests made after entry and before the expiration of ten days after liquidation. We filed many hundreds of protests each year, going up into the thousands some years.

Witness was then asked, having first stated that he was able to answer, to state what proportion of such protests were filed by his office before liquidation of the entry. Defendants' counsel
35 objected to the question as immaterial, the court sustained the objection, and plaintiffs' counsel duly excepted, and the exception was allowed.

Plaintiffs' counsel read from the testimony of Edmund W. Evans, given in this court, on the 25th day of October, 1878, in the case of Kayser *v.* Arthur, as taken down at the time by S. B. Hinsdale, at that time stenographer to the United States court and in the district attorney's office.

The testimony was in substance as follows:

I am and have been for about twenty years liquidator in the custom-house, and am familiar with the entire course of the business in the custom-house in respect to these entries. The protest and appeals are received by me from the 7th division. We then have the entries got up, and the entries are endorsed with the number of the appeal and the date and also the date of the protest. A letter is then written on a sheet, which is in part printed, the form prescribed by the Secretary of the Treasury. The letter, the protest, and the appeal are sent by me to the auditor, who checks the letter and the protest and the appeal, and the whole are then sent to the collector, and from his office they are transmitted to the Department. I should say from one-third to one-half of the protests and appeals for the last ten years were filed in the custom-house prior to the date of the stamp of liquidation upon the back of the entry. I don't think there have been as many lodged prior to liquidation as after,
36 but a very great many—a very large per cent. If the protest and appeal was filed prior to ten days after date of the stamp upon the back of the entry it was uniformly regarded as in time. All the appeals and protests passed through my hands. Ordinarily the entries had been liquidated when I transmitted the protest and appeal, and there have been some cases where the protest and appeal

have been forwarded prior to liquidation, but those were exceptional cases.

Defendants' counsel then read in evidence from the cross-examination as follows:

Witness. being shown an invoice and entry, testified in reference to the entry that the first thing done at the custom-house is the presentation of the entry and invoices to the collector or thee ntry clerk representing the collector. The collector or entry clerk makes up the figures which pretend to be a statement of the amounts and rates and the amount of duty on the goods, which appear on this entry in blue ink, and the entry and invoice are then transmitted to the naval office and the calculation is examined and passed upon by the naval office and the papers are then returned to the collector and the entry is placed on file and the invoice is transmitted to the appraiser. After this entry was made and the invoice returned to the custom-house at the same time the entry was then amended for duty in accordance with the report of the appraiser and then transmitted to the naval office for the purpose of verifying the collector's figures and then returned to the collector in the ordinary routine of business. The entry was then stamped for refund of the ex-
37 cess of duty paid, stamped with the printed stamp and with the figures showing the amount paid and the amount as returned and the difference between the two. Then the entry went to the cashier in the naval office, and it is put on his books, checked by the clerk in the collector's office, and a notice sent to the importer that there is an amount due them.

Plaintiffs then called as a witness I. AUGUSTUS STANWOOD, who, being duly sworn, testified in substance as follows:

I am a custom-house clerk and have been employed in the custom-house since October, 1875. For the first three years I was a clerk and copyist, and after that I was a refund clerk and had charge of the preparation of refund statements. The statements are prepared in the collector's office and forwarded by him to the Secretary of the Treasury and there examined and the money called for, and the money that the Secretary finds to be called for is transmitted to the collector for payment to the claimant. In the course of preparing refund statements I think I have included a good many entries where the protests had been filed prior to September, 1873, and certified statements where the protests were before liquidation. These refund statements always contained the date of the filing of the protest and the date of the liquidation of the entry. I never knew a statement not to be paid upon the ground that the protest was made before liquidation. Protests before liquidation were always treated by me as valid in making up statements until a decision, which was made in 1878 by Chief Justice Waite, that a pro-
38 test before liquidation was not good. For a time after that all protests filed before liquidation the appeals were sent to Washington and the answer came back always, "Not entertained." The appeal was not entertained on account of the instruction contained here, and during that time no entry was included in the

statement where a protest was made before liquidation. This was in accordance with circular dated September 30, 1878. After that circular was issued in 1878 there was another circular of instructions issued referring to No. 3730 received at the custom-house.

This circular was then read in evidence:

"TREASURY DEPARTMENT, *July* 8, 1879.

SIR: In decision 3730, dated Sept. 30, 1878, the Department adopted a ruling of the circuit court at New York in the case of the U. S. *vs.* Watt *et al.*, in which it was held that protests and appeals filed under section 2931 of the R. S. must be so filed within the statutory time after the final liquidation of the duties, and that such documents filed before the completion of such final liquidation were to be regarded as premature, and therefore not valid. This ruling of the court was in contravention of the practice at your port and at all the other prominent ports of the U. S. under which protests and appeals had been recognized both by the customs officers and by this Department as valid if filed at any time before the expiration of the time mentioned in the section of law cited.

39 Since the decision in the case of Watt against the U. S. was made the case of Keyser against Arthur has been tried at the port of N. Y., which involved questions connected with the liquidation of entries and the filing of protests and appeals therefrom. In the case of Watt against the U. S. it seems to have been assumed by the court that the liquidation of an entry was one single act complete at a definite time and not a successive series of acts on the part of the various customs officers, as is the case, and in the case of Keyser against Arthur it was held that a protest filed after the first liquidation of the entry as to the rate of duties is to be regarded as valid, although the final liquidation as to the amount to be exacted may not be perfected until afterwards. These decisions of the courts are radically in conflict with each other. Difficulties have been experienced in administering the law as laid down in the case of Watt against the U. S., and the effect of that decision would be to invalidate protests and appeals which were filed long before such decision was made and before the date of final liquidation of the entry, which had at the time been accepted by this Department as valid. In view of the conflicting opinions of the courts upon this question and the long-established practice of this Department in accepting protests and appeals filed at or before the liquidation of the entry, the Department decides to administer the law upon the basis of its former practice until a decision of the Supreme Court shall be had upon the question.

40 It is, therefore, ordered that protests and appeals filed at any time prior to the expiration of the ten and thirty days, respectively, specified in section 2931 of the R. S. are to be regarded by customs officers and this Department as complying with the requirements of the law as to time.

By order:

Very respectfully, H. F. FRENCH,
Assistant Secretary.

Collector of customs, N. Y."

41 After receipt of these instructions the same practice was resumed of including in the statements entries where the protest had been filed before liquidation and the statements were sent to Washington and paid by the Department. Those entries that had been suspended or had not been included in the statements which were sent from some time in 1878 until July 1879, were marked "Appeal not entertained," but, notwithstanding that, they would put in certified statements, and the Department's attention being called to why they were not entertained they were paid the same as the rest.

Being cross-examined by counsel for the defendants, witness testified:

All the claims which were made up at the custom-house, including items between September 30, 1878, and July, 1879, were paid in accordance with the Secretary's second instructions. I know it because I made all the statements myself, and I drew the receipts for their payment and they went and got their check upon my initials being on the papers that they had signed.

Plaintiffs then called as a witness JOHN R. LYDECKER, who, being duly sworn, testified in substance as follows:

I was chief clerk of the warehouse department in the New York custom-house from 1854 until 1868; after that I became deputy collector in charge of the division having charge of the entry and liquidation of merchandise, and remained in that division until about 1880. For a time I was also a special deputy for several years prior to 1880, having general charge of the custom-house and
42 of the business of the custom-house; had nothing to do with protests relating to warehouse entries further than to report upon the liquidation of the entries in question, and also prepared the letter of transmission to the Department.

From June 30, 1864, to September, 1873, my recollection of the practice at the custom-house is that protests were regarded as filed in time if filed after the making of the entry at any time up to ten days after the liquidation of an entry, and have no recollection of the discontinuance of that rule so long as I remained in the custom-house.

Plaintiffs' counsel then offered in evidence article 234 from the customs regulations of 1857, as follows:

"With a view to uniformity in practice at the several custom-houses in respect to the entry of merchandise it is deemed proper to state in addition to the general provisions on the subject in these regulations that the importer should be required to carry out in his entry the value of each description of goods, paying a different rate of duty under the appropriate head of 5, 10, 15, 20, 25, 30, 40, or 100 per cent., as the case may be.

"The clerk charged with the examination of entries will compare the classification made by the importer with the description given

in the invoice and see that the several articles are entered at the rates provided by law, it being considered that the determination of the schedule under which merchandise may be admitted to entry devolves upon the collector and is a part of his proper duties.

43 For the information of the appraiser and to ensure the correct classification the rates at which articles of merchandise are allowed to be entered will in all cases be noted by the collector against such articles on the invoice either by figures at 5 per cent., 10 per cent., &c., or by the letter representing the schedule of the tariff act under which, in his opinion, they are chargeable. This will be done at time of entry and before the invoice is transmitted to the appraiser for examination. It is also required that all additions for charges and commissions, as well as additions by importers, under the 8th sec. of the act of July 30, 1846, should be noted at the foot of the invoice so that the appraisers may be informed of the precise value declared on entry."

44 Plaintiffs' counsel then read in evidence a circular from the Treasury Department, July 1st, 1864, signed by the Secretary of the Treasury, transmitting the act of Congress of June 30, 1864, as follows:

"TREASURY DEPARTMENT, *July* 1, 1864.

The following act of Congress, approved June 30, 1864, which goes into effect this day, is published for the information and government of the officers of the customs at the several ports and others concerned.

The attention of collectors, as well as that of owners, importers, consignees, and agents, is particularly directed to sections 14 and 15, wherein it is required that protests and appeals must be made on each entry whenever owners, importers, consignees, or agents are dissatisfied with the decisions of collectors, as is more particularly set forth in said sections.

No protest can be received by a collector if not made according to and within the time prescribed by this act, and no appeal will be entertained at this Department unless made in accordance with the provisions of this act.

GEO. HARRINGTON,
Secretary of the Treasury ad Interim."

45 Plaintiffs' counsel then offered in evidence the circular of the Treasury Department of May 10th, 1867, on page 102 of Circulars from Treasury Department, March, 1865, to May, 1867, Volume 6:

"TREASURY DEPARTMENT, *May* 10, 1867.

Section 14 of 'An act to increase duties on imports, and for other purposes,' approved June 30, 1864, provides:

(Section 14 of above act is here quoted in full.)

In view of this provision making the rights of importers dependent upon a compliance therewith within a specified time 'after the ascertainment and liquidation of the duties' it is deemed proper

that they should be duly notified of the time at which the duties on their respective entries may have been ascertained and liquidated. You will, therefore, cause to be kept a record of the several entries liquidated from day to day, stating the name of the vessel, the place from which and the time when she arrived, the name of the importer and the date of entry, and will give notice of the liquidation of such entries by posting in some conspicuous place in the custom-house accessible to the public, on the day succeeding the date of ascertainment and liquidation, a transcript of such record, there to remain for ten days, when such transcript will be removed and filed with the records of your office, and the posting of such transcript will be deemed and taken to be a full notice to all parties interested. The notice of dissatisfaction or protest referred to in the section before cited must in all cases be presented to the collector within
46 ten days, and the appeal to the Secretary of the Treasury be taken within thirty days after notice of the ascertainment and liquidation of the duties, as herein provided. When an appeal is taken from the decision of a collector such appeal, addressed to the Secretary of the Treasury, may be delivered to such collector, who is hereby instructed to receive and transmit the same to this Department, with a full report of the case, together with a statement of the reasons for his decision.

H. McCULLOCH,
Secretary of the Treasury."

47 Plaintiffs' counsel then offered in evidence circular to the collector of customs, dated Treasury Department, January 14, 1869, signed by Hugh McCullough, Secretary of the Treasury, found on page 73 of Volume 7 of Circulars of the Custom-House:

"TREASURY DEPARTMENT, *January 14th*, 1869.

Much unnecessary delay and inconvenience occur by reason of the neglect on the part of importers and others to comply with the request contained in the concluding paragraph of circular dated May 10, 1867, in relation to the delivery of appeals taken under the 14th and 15th sections of act of June 30, 1864, to the collector for transmission, instead of the importer sending them direct to this Department. I will thank you to cause to be printed a notice to importers containing the wishes of the Department in this respect, and have the same placed conspicuously in various parts of your custom-house, and also in the appraiser's stores and other buildings connected therewith, with a view to the greatest possible publicity. The writing of thousands of letters annually and consequeut expense of transporting the same by the Post Office Department will be avoided if the request of this Department be complied with, whilst the business will be more promptly and satisfactorily transacted. It must be expressly understood, however, that the right of an importer to appeal directly to the Secretary of the Treasury is not intended to be questioned, but, on the contrary, is fully recognized, although the Department is not aware of any case
48 where the appeal could not be transmitted through the col-

lector, accompanied by his report thereon, to the great saving of time and money, as above stated.

(Signed) H. McCULLOCH,
Secretary of the Treasury."

49 Plaintiffs' counsel then offered in evidence the Department circular of August 13, 1875, found on page 75 of Volume 10 of Circulars:

"TREASURY DEPARTMENT, *August* 13, 1875.

The attention of collectors and other officers of the customs is specifically called to sections 2931 and 2932 of the R. S., relative to protests and appeals to be taken by importers against alleged excessive assessments of duty, and for the general information of importers and others concerned the sections referred to are herewith published as follows:

SEC. 2931. On the entry of any vessel or of any merchandise the decision of the collector of customs at the port of importation and entry as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise and the dutiable costs and charges thereon shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision,
50 setting forth therein, distinctly and specifically, the grounds of his objections thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. The decision of the Secretary on such appeal shall be final and conclusive, and such vessel or merchandise or costs and charges shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel or on such merchandise or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains.

SEC. 2932. The decision of the respective collectors of customs as to all fees, charges, and exactions of whatever character other than those relating to the rate and amount of duties to be paid on the tonnage of any vessel or on merchandise and the dutiable costs and charges thereon, claimed by them or by any of the officers under

them in the performance of their official duty, shall be
51 final and conclusive against all persons interested in such fees, charges, or exactions, unless the like notice that an appeal will be taken from such decision to the Secretary of the Treasury shall be given within ten days from the making of such decision, and unless such appeal shall actually be taken within thirty days from the making of such decision; and the decision of the Secretary of the Treasury shall be final and conclusive upon the matter so appealed, unless suit shall be brought for the recovery of such fees, charges, or exactions within the period as provided for in the preceding section in regard to duties. No suit shall be maintained in any court for the recovery of any such fees, costs, and charges alleged to have been erroneously or illegally exacted until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains.

These sections of law prescribe the only way in which importers can secure a review by the Department of the action of customs officers in deciding upon rates of duty. Protests must be made in duplicate, addressed to the collector or surveyor making the assessment, and, as well as appeals, should be filed with such officer, the appeal and one copy of the protest to be by him forwarded to the Department. It occasionally happens that appellants trans-
52 mit their appeals directly to the Department, which are then necessarily returned to the collector for report. In reporting upon such appeals, as also upon those originally filed with customs officers, they will be careful in all cases to state whether protest and appeal have been taken within the time required by law, and to see that the date of liquidation of the entry is endorsed upon each appeal before transmission to the Department. Care will also be taken in submitting or reporting upon appeals to state the character of the goods involved with sufficient clearness to enable the Department to act understandingly in deciding such appeals. It will be observed that section 2931, before quoted, requires that the protest should set forth specifically the grounds of the objection to the duty assessed, and in pursuance thereof it is held by the Department that protests should state clearly and distictly the grounds thereof, and the nature and extent of the claim made by the importers with reference to the classification of the merchandise to which the same relates and the rate of duty which should in their opinion be assessed thereon. When a protest is defective in any of these particulars the importers should be requested to amend the same, and to that end the protest should be duly examined by the customs officers at the time of filing. The appeal may, at the option of the importer, be filed concurrently with the protest.

C. F. BURNAM,
Acting Secretary.

Collectors of customs and others."

53 Plaintiffs then called as a witness STEPHEN G. CLARKE, who, being duly sworn, testified in substance as follows:

I was deputy collector of the New York custom-house, in charge of the law division, from March, 1869, until the 1st of June, 1872. That division had charge of the bureau of protests and appeals. When I entered the custom-house and during the time I was deputy collector it was the practice, not only by the officers of the custom-house in New York but by the Treasury Department, as evidenced by their action upon protests, to regard protests filed at any time after the date of the entry up to ten days after liquidation of that entry, as stamped upon it, as being filed within the time required by the act of 1864.

Plaintiffs then called as a witness CHARLES CURIE, who, being duly sworn, testified in substance as follows:

I was a custom-house broker in the New York custom-house prior to 1873. From 1859 to 1864 I was an importer's clerk. In the course of that employment I became acquainted with the practice as to protests filed before liquidation. There was no difference made between those filed after entry and those filed after liquidation.

Witness was then asked to state what proportion of the protests he filed were filed before liquidation.

To this question defendants' counsel objected as immaterial, the court sustained the objection, and plaintiffs' counsel duly excepted, and the exception was allowed.

54 I know from observation and practice in the custom-house that there were a good many protests filed after the date of liquidation during those years. As to the entries upon which the rate was questioned at the time of entry the protests were filed between that and the date of liquidation. On those entries, where the rate of liquidation was changed from that fixed on the entry, the protests were filed after liquidation; that was the general rule.

Plaintiffs' counsel then offered in evidence Treasury circular No. 6895, from the Synopsis of Decisions of the year 1885, commencing on page 183 with the words:

"The opinion of the solicitor of the Treasury, to whom the matter was referred, is that the ascertainment and liquidation of the duties mentioned in section 2931, Revised Statutes, is the liquidation which takes place on the original import entry, whether such entry be made for warehouse or for consumption, and that whenever such liquidation is made on the import entry the date of it is the time from which the statute begins to run.

The Department adopts this opinion; but, in order not to work unnecessary injustice, you are instructed to give public notice of this decision, and that protests and appeals filed in connection with original entries made on and after the 10th instant must be filed in the manner herein prescribed.

Very respectfully, C. S. FAIRCHILD,
Assistant Secretary.

Collector of customs, New York."

55 Plaintiffs' counsel then offered in evidence, from the Synopsis of Decisions for 1886, No. 7386, dated January 23, 1886:

"TREASURY DEPARTMENT, *January* 23, 1886.

SIR: A copy of my recent special report to Congress on the subject of protests, appeals, and suits is herewith transmitted for your information. You will hereafter, beginning February 1, 1886, be governed by Treasury decision (3736) of September 30, 1878, and the opinion of the Attorney General of October 30, 1878, in the execution of section 2931 of the Revised Statutes, and you will not treat as valid any notice of dissatisfaction served or lodged before the work of ascertainment and liquidation has been fully completed, as defined by article 359 of General Treasury Regulations of 1884. You will also take special care that article 362 of the regulations is faithfully executed, and you are expected, so far as practicable, to examine protests in person whenever new questions shall be presented therein, and to carefully revise the doings of the liquidating clerks, which are distinctly specified as unsatisfactory. You will also hereafter, when reporting to this Department on appeals, give the date of liquidation of the original entry and the day when the protests were served on you.

DANIEL MANNING, *Secretary.*"

56 Plaintiffs' counsel then offered in evidence, from the decisions of 1887, No. 8476, dated October 15, 1887:

"TREASURY DEPARTMENT, *October* 15, 1887.

SIR: Enclosed herewith please find a letter dated the 13th instant, received from Messrs. F. Bianchi & Co., in which they request that instructions be issued for the reliquidation of certain entries of artificial flowers, &c., set forth in a schedule accompanying their letter, where, as alleged, duties were exacted on charges for cartons, packing, &c.

The applicants allege that the requirements of law as to protest and appeal were complied with in each case, and that the statements contained in the memoranda submitted by them seem to confirm this claim, the importations appearing to have been made in 1883 and 1884, prior to the decision of the Department requiring protest and appeal to be filed subsequent to the liquidation of the entry.

The views of the Department expressed in the letter of the 16th ultimo, with reference to premature protests, were intended to apply only to those cases where, in the judgment of the collector, there had been some fraud or other conduct evincing bad faith on the part of the importer and where, for such reasons, it was believed that the Government ought not in justice to make a refund, but should compel the claimant to establish his right to the refund by a successful recovery in a suit in court. In view of the uncertainty in regard to the proper construction of the law upon the subject
57 which prevailed prior to Department's letter of January 23, 1886 (synopsis 7386), and the conflicting opinions of the courts and the law officers of the Government and the uniform prac-

tice of the Department in receiving these protests without question, which practice was expressly established by the opinion of the solicitor of the Treasury and Department's letter of May 2, 1885 (synopsis 6895), it was not intended that in cases where the importer had acted in good faith and the only question which could be raised in regard to his right to a refund was that of the premature filing of the protest he should be denied what would otherwise be due him and which has been uniformly allowed heretofore in other similar cases.

It is believed that the interests of justice will be satisfied if in any cases arising before February 1, 1886, the question as to the validity of premature protests is confined to those cases where for other reasons the collector is satisfied that the Government should defend the action and compel the plaintiff to establish his claim in court, and in all such cases the question as to the validity of the protest, as well as all others arising upon the trial, may properly be submitted to the court for its decision.

You will be governed by these views in reliquidating entries and settling suits now pending at your port which are entitled to settlement for refund under the decision of February 2, 1886 (synopsis 7387), or otherwise.

58 Please return the enclosure with a report of your action in the case.

Respectfully yours, I. H. MAYNARD,
Assistant Secretary.

Collector of customs, New York."

Plaintiffs then called as a witness D. IVES MACKIE, who, being duly sworn, testified in substance as follows:

I am an attorney-at-law; for the past few weeks I have examined some thirty or forty cases upon the calendar of this court with a view to the preparation for trial and of ascertaining whether the protests were filed before or after liquidation; have examined the original protests and entries in the district attorney's office and can state very nearly the number of protests that were filed before liquidation in those cases.

Witness was then asked to state the number that were filed before liquidation.

Defendants' counsel objected to the question as immaterial. The court sustained the objection, and plaintiffs' counsel excepted, and the exception was allowed.

The plaintiffs then rested.

59 Defendants then called as a witness FREDERICK W. BROOKS, who, being duly sworn, testified in substance as follows:

I have been a liquidating clerk in the custom-house about ten years; previous to that I was clerk in the law division for eight or ten years, from some time in 1869 up to about some time in 1877; before that I was a clerk in the auditor's office, and I was inspector of customs during a portion of 1868. I am acquainted with the

course of business at the custom-house with regard to the liquidating of entries.

Being cross-examined by plaintiffs' counsel, witness testified:

Being handed an entry, said that he had never seen it until recently and had nothing personal to do with the liquidation of it; that he was familiar with all but one of the various handwritings.

Direct examination:

The entry is presented by an importer to the custom-house in connection with the invoice, if any, bill of lading, if any, and it is presented to the entry clerk. That entry is made up so that it contains the marks and numbers of the merchandise covered thereby; a description of the same, giving their classification as the importer understands it; the rates of duty which the importer understands is to be paid upon the goods covered thereby, and a separation of the values, so that the amount to be paid on each rate of duty is separately figured. Upon that entry the entry clerk in the collector's office makes the computation of the estimated duty. The collector's copy of that entry is then taken to the naval
60 office, where, upon the naval office copy of the entry (which is a duplicate of that presented to the collector), a similar computation is made by the entry clerk in the naval office. If the computations of the two entry clerks agree the copy presented to the collector is returned to the collector's office, the oath upon the entry is taken by the importer, the duty is paid by the importer, and the entry then passes to the files of the custom-house. After the invoice has been returned to the collector by the appraiser and the appraiser has noted on that invoice his appraisement of the goods covered by it, the invoice, together with the entry, is handed to a clerk known as the liquidating clerk, who proceeds to compute the duty upon the importation. This computation is based upon the figures and values contained in the invoice and entry and the return of the appraiser upon the invoice as to the classification and value of the goods. The liquidating clerk then makes a computation of the duty due upon the importation; and the collector's copy of the entry, together with the invoice and such other papers as relate to the importation (such as the weighers' and gaugers' returns and others, if there be any), are transmitted to the naval office, where the liquidating clerk in the naval office makes a similar computation of the duties upon the importation, and if the computation made by the liquidating clerk in the naval office agrees with that made by the liquidating clerk in the collector's office the collector's copy of the entry is returned with the invoices and other papers pertaining thereto to the collector's office. When the entry is returned
61 the check of the liquidating clerk in the naval office who made the computation of the duties upon the importation is added to intimate that the computation of the collector has been verified and found correct. If, however, the computation of the duties on the importation by the liquidating clerk in the naval office differs from that made by the liquidating clerk of

the collector's office the liquidating clerk in the collector's office makes the computation anew. That computation is not final until the respective liquidating clerks in both offices have agreed upon the ascertained duty. When the ascertained duty is confirmed by both officers, by the check of the liquidating clerk of the collector's office appearing upon the entry, and by the check of the liquidating clerk in the naval office appearing upon the entry, the entry then passes to a clerk, who issues a notice (if there be any) for any additional duty which may be due or for any refund which may be due to the importer. A record of the entry is then made upon what is known as the liquidation sheets. The practice has varied in this respect, for at the time this entry was liquidated an entry of liquidation was made in a book which was called "Records of Liquidations." The clerk who makes the record of the liquidation of the entry upon the recording sheets, or the other clerk, if there be one to assist him in his duty, stamps upon the back of the entry the date which he has pasted upon the sheets. The practice was the same as it is now. (Being shown an entry:) The ordinary course of business, as I have described it, was followed with regard to that entry.

62 The stamp upon the back of the entry is "Entered and liquidated December 30, 1873." That is the date which I have described as the one put on after the liquidating officers of the collector's and naval offices had examined the computations and found them to be correct, and is the date upon which the notice is given to the importer of the ascertainment and liquidation of duties.

Being cross-examined by plaintiffs' counsel:

When the entry is presented the entry clerks also see that the rates of duty affixed to the goods are the rates that are required according to the invoice description, and there is upon this entry, Exhibit 1, figures in blue ink stating the amounts of duty and rates made by the entry clerk at the time of the original presentation of the entry. In this case they bear the check only of the entry clerk in the naval office, the clerk in the collector's office having omitted his check. If the naval office does not agree as to the correct rate of duty being estimated, the correct rate and amount of duty having been estimated upon the entry by the collector's entry clerk, it is returned to the collector's office without being passed by the naval office, and the difference has to be adjusted between the two offices before any further procedure is had with the entry. The entry clerk writes upon the invoice his name, the amount of the invoice value (and I am now speaking of the period when this entry was passed), the charges, if any, added by the importer, and the commission, if any, added by the importer. He also stamps

63 upon the entry the following words: "I certify that this invoice was presented to me on" (leaving a blank to be filled in by the name of the vessel) "at the custom-house of New York this" (leaving a blank to be filled in with the day of the month) "day of" (leaving a blank to be filled in with the name of the

month) "18" (leaving a blank to be filled in with the figures of the year). The signature or initials representing a signature are appended to that statement by the entry clerk as evidence that he has put the stamp and other particulars on the invoice. The writing of his name before the stamp evidences that he puts the stamp there. Upon the back of the entry there are more signatures of the entry clerk and of other officers of the customs. At the time the entry clerk passes the entry he places his initials upon that part of the entry which is beneath the blank form of the oath required to be taken by the importer, which certifies as well that the oath is the proper oath to be taken and that he has made the proper calculation as to the rate and amount of duty and placed them upon the entry. Where it does not appear it is accidental, the custom being for the entry clerk to affix his initials upon the face of the entry immediately over his computation of the estimated duties and also upon the back of the entry immediately over the blank provided for the oath of the importer, and then the importer makes oath and the deputy collector witnesses it. For a portion of the time the oath made by the importer was made before the entry was passed by the entry clerk; for the remainder of the time the oath made by the importer was made after the entry clerk had passed the entry.

64 As to the particular time at which this entry was passed I am unable to testify.

Redirect examination by defendants' counsel:

In the usual course of business it is the practice of the entry clerk to compute the estimated duty from the information furnished to him by the importer upon the entry as it is presented. In order that a check may be made upon the preparation of the entry by the importer it has been the custom for the entry clerk to verify the arrangement of the entry and the preparation of it by the importer by a comparison of the entry with the invoice. The computation is made subsequent to the return of the appraising officers as to the character of the goods and their amount and value.

Recross-examination by plaintiffs' counsel:

The invoice is presented to the entry clerk at the same time the entry is. As a matter of fact the computation of the entry clerk and his estimate of the duties upon the entry is properly made from the facts presented by the entry in comparison with the invoice; but if the entry is not properly made up, then the entry clerk will sometimes reject it.

Defendants' counsel then put in evidence a letter from the Treasury Department to the collector at Wilmington, Del., dated January 24, 1873, No. 1372, in volume for 1873 of Synopsis of Decisions of the Treasury Department.

65 Protest and appeal against the collection of tonnage dues must be made in writing, not verbally, under sections 14 and 15, act of June 30, 1864, within the time required by law before the

Department can decide as to the correctness of such exaction. The destination of the vessel should be stated when she is cleared from your port (see synopsis 909), and also whether she carried cargo or passengers (act of March 2, 1867, sec. 33). (Letter to collector, Wilmington, Del., January 14, 1873, navigation division.)

66 Defendants' counsel then put in evidence Department letter, signed B. H. Bristow, Secretary, to the collector of customs at New York, dated May 15, 1876, and No. 2809 in the volume of Synopsis of Decisions of the Treasury Department for the year 1876.

67 TREASURY DEPARTMENT, *May* 15, 1876.

SIR: Your letter of the 4th instant is received, further reporting on the appeal (9157*d*) of Blume & Co. from your decision assessing duty at the rate of 5 cents per pound on certain chiccory imported per "Staubo," July 8, 1875, which appeal was, as you were informed on the 28th ultimo, not entertained by the Department because of your former report, dated March 9 last, that neither protest nor appeal was made in time.

The appellants, by their attorneys, Messrs. Hartley & Coleman, now claim that their protest and appeal were made within the proper time, and state that the entry was a withdrawal entry for consumption, made March 3, 1876, and that on the same day protest and appeal were lodged against your assessment and exaction of duty at the above-mentioned rate. This statement of fact you admit to be correct.

The decision of the Supreme Court of the United States (Westray *vs.* United States, 18 Wallace, 329), to which the appellants refer in support of their claim that the protest and appeal were in time, seems to set forth the doctrine that the withdrawal entry for consumption of goods entered for warehouse is the liquidation of the entry which an importer should take notice of for the purpose (if he be dissatisfied with the action of the collector) of protesting and appealing therefrom under and in pursuance of section 2931 of the Revised Statutes.

68 The course thus indicated was pursued by the appellants in this case, and therefore the Department, in accordance with such decision, hereby entertains and decides the appeal in question.

Upon an investigation of the matter it appears that the chiccory in question is "burnt, ground, and packed in paper packets," and, consequently, that it is dutiable at the rate of 5 cents per pound under the provision for "chiccory root, burnt or prepared," in accordance with Department's ruling of May 22, 1875. (Synopsis 2263.)

Your decision is therefore affirmed.

Respectfully, B. H. BRISTOW, *Secretary.*

Collector of customs, New York.

69 Also Department letter, signed by H. F. French, Assistant Secretary, addressed to John C. Kohlsadt's Sons, dated March

10, 1877, and No. 3139, in the volume of Synopsis of Decisions of the Treasury Department for the year 1877.

70 TREASURY DEPARTMENT, *March* 16, 1877.

GENTLEMEN: The Department is in receipt of your letter of the 6th instant, in the matter of your protest on case "K. B., No. 2762," ex "Lessing," September 27, 1876, in which you inquire whether the law allows you to compute the time for protest by excluding Sundays and legal holidays.

In reply, you are informed that section 2931 Revised Statutes requires that protest must be lodged with the collector within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, and that the Department has uniformly held that the ten days specified in said section include intervening Sundays and holidays.

Respectfully, H. F. FRENCH,
Assistant Secretary.

Messrs. J. C. Kohlsaat's Sons, New York.

71 Also Department letter, signed by H. F. French, acting Secretary, to the collector of customs at New York, dated August 13th, 1883, being No. 5856 in the volume of Synopsis of Decisions of the Treasury Department for the year 1883.

72 TREASURY DEPARTMENT, *August* 13, 1883.

SIR: In Department's letter to you of April 4, 1881, authority was given to refund overpaid duties on certain chiccory entered for warehouse by Messrs. Rosenstein Bros. under the following circumstances: Protest and appeal were duly taken against an assessment of 5 cents a pound duty, and the decision of the collector was affirmed by the Department on October 19, 1874. Ten cases were withdrawn for consumption March 6, 1875, and the other twenty cases on July 31, 1875. Suit to recover difference between the 5 cents a pound duty exacted and the 1 cent a pound duty claimed was brought on September 14, 1875, which was within ninety days from the last withdrawal, but not within ninety days from the first withdrawal.

The rate of duty on that class of merchandise having been established at 1 cent a pound, it was held by the district attorney at New York that the plaintiffs were entitled to recover on both withdrawals, because section 2931, Revised Statutes, contemplates but one protest, one appeal, and one suit in connection with one entry, and the instructions of the Department to refund the overpaid duties on both withdrawal entries were based on the view thus laid down.

Payments on partial withdrawals are but payments on account, subject to revision on liquidation of the last withdrawal under
73 the bond, and, according to the principle thus adopted, it will be regarded by the Department as sufficient to protect the rights of parties under decision 2809 and section 2931, if one protest and appeal shall be filed on the final withdrawal under a bond,

which may cover any question which has arisen in the settlement of duties under said entry. This course will tend to lessen the number of protests and appeals, and thereby lessen the labors of merchants and customs officers.

Very respectfully, H. F. FRENCH,
Acting Secretary.

Collector of customs, New York.

Also article 359 of the Treasury regulations of 1884:

74 Art. 359. The rights of importers in certain cases depend upon protest and appeal within a specified time "after the ascertainment and liquidation of duties," and they should be notified of the time at which the duties on their respective entries are ascertained and liquidated. R. S., 2931; circular, May 10, 1867.

Collectors will therefore keep a daily record of the entries liquidated, stating the name of the vessel, the place from which and the time when she arrived, the name of the importer, and the date of entry, and will give notice of the liquidation of such entries by posting in some conspicuous place in the custom-house accessible to the public, on the day succeeding the date of ascertainment and liquidation, a transcript of such record, there to remain for ten days, when such transcript will be removed and filed with the records of the office.

The posting of the transcript will be deemed and taken to be a full notice to all parties interested. No such notice, however, can be demanded as a matter of right.

75 It was conceded that after the papers came back from the naval office some clerk in the custom-house entered them on a sheet and stamped on the back of the papers that they were liquidated at such a date.

Counsel for the plaintiffs then moved the court to direct a verdict for the plaintiffs; which motion the court denied, and the plaintiffs, by their counsel, duly excepted; which exception was duly allowed.

The counsel for the defendants thereupon asked the court to direct a verdict for the defendants separately as to each of the entries in the case upon the ground that the protest in each case appears by the testimony in this case to have been filed before the liquidation of the entry to which it refers, and not within ten days thereafter, as required by law. This motion the court granted as to each entry, and the plaintiffs, by their counsel, then and there duly excepted separately as to the several rulings as to each entry, and the exception was duly allowed.

Thereupon, by direction of the court, the jury found a verdict for the defendants; to which ruling and direction counsel for plaintiffs duly excepted, and the exception was allowed.

And inasmuch as the foregoing matters of law and fact and the several exceptions taken, made, and allowed do not appear upon the records of the trial, therefore, upon the prayer of the
76 plaintiffs, by their counsel, the said judge has signed and

sealed the foregoing as and for the bill of exceptions in this case as of the 13th day of April, 1888.

E. HENRY LACOMBE. [L. S.]

Consented to.

STANLEY, CLARK & SMITH.
STEPHEN A. WALKER,
H. C. P.

77 [Endorsed:] No. 2731. U. S. circuit court, southern district of New York. John M. Davies *et al. vs.* Charles E. Miller *et al.*, ex'rs, &c. Bill of exceptions. Stanley, Clarke & Smith, attorneys for plaintiffs, 120 Broadway, N. Y. city. U. S. circuit court. Filed Oct. 1st, 1888. John A. Shields, clerk.

78 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

JOHN M. DAVIES and ROBERT K. DAVIES

vs.

CHARLES E. MILLER and DANIEL G. ROLLINS, Executors of Chester A. Arthur, Deceased.

Know all men by these presents that I, Harry Overington, am held and firmly bound unto the above-named Charles E. Miller and Daniel G. Rollins, ex'rs, &c., in the sum of two hundred and fifty dollars, to be paid to the said defendants; for the payment of which, well and truly to be made, *we* bind *ourselves and each of us, our* and each of *our* heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with *our* seals and dated the first day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas the above-named John M. Davies and Robert K. Davies have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named John M. Davies and Robert K. Davies shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HARRY OVERINGTON.

Sealed and delivered and taken and acknowledged this 1st day of October, 1888, before me—

BENJAMIN BARKER, JR.,
Notary Public, N. Y. Co.

79 [Endorsed:] 2731. U. S. circuit court, southern district of New York. John M. Davies *et al. vs.* Charles E. Miller *et al.*, ex'rs, &c. Bond for costs on writ of error. Appeared as to form, amount, and sufficiency of surety. E. Henry Lacombe. U. S. circuit court. Filed Oct. 1, 1888. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

Harry Overington, being duly sworn, doth depose and say that he is worth the sum of two hundred and fifty dollars over and above all his just debts and liabilities.

HARRY OVERINGTON.

Sworn to this 1st day of Oct., A. D. 1888, before me—
BENJAMIN BARKER, JR.,
Notary Public, N. Y. Co.

80 *Assignment of Errors.*

Supreme Court of the United States.

JOHN M. DAVIES and ROBERT K. DAVIES, Plaintiffs in Error,
vs.
CHARLES E. MILLER and DANIEL G. ROLLINS, Executors, &c., of Chester A. Arthur, Deceased, Defendants in Error.

Afterwards, to wit, on the fourth Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, come the said plaintiffs in error, by Stanley, Clarke & Smith, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendants.

And the said plaintiffs pray that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that they, the said plaintiffs, may be restored to all things which they have lost by occasion of said judgment, &c.

STANLEY, CLARKE & SMITH,
Attorneys for Plaintiffs in Error.

81 [Endorsed:] 2731. United States Supreme Court. John M. Davies *et al.*, plaintiffs in error, *vs.* Charles E. Miller *et al.*, ex'rs, &c., defendants in error. Assignment of error. Stanley, Clarke & Smith, 120 B'way, N. Y. city, attorneys for plaintiffs in error. Due service of a copy of the within assignment of error is hereby admitted this 1st day of October, 1888. Stephen A. Walker, attorney for defendants in error. To —— ——, attorney for — in error. U. S. circuit court. Filed Oct. 1, 1888. John A. Shields, clerk.

82 *Joinder in Error.*

Supreme Court of the United States.

JOHN M. DAVIES & ROBERT K. DAVIES, Plaintiffs in Error,

vs.

CHARLES E. MILLER & DANIEL G. ROLLINS, Executors, &c., of Chester A. Arthur, Deceased.

And afterwards, to wit, on the fourth Monday of October, in said term, the said defendants in error, by Stephen A. Walker, their attorney, come here into court and say that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And they pray that the said Supreme Court, before the Justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

STEPHEN A. WALKER,
Attorney for Defendants in Error.

83 [Endorsed:] 2731. United States Supreme Court. John M. Davies & ano., plaintiffs in error, *vs.* Charles E. Miller & ano., executors, &c., defendants in error. Joinder in error. Stephen A. Walker, attorney for defendants in error. Due service of a copy of the within joinder in error is hereby admitted this 2 day of October, 1888. Stanley, Clarke & Smith, attorneys for plaintiffs in error. To Stanley, Clarke & Smith, attorneys for plaintiffs in error. U. S. circuit court. Filed Oct. 2, 1888. John A. Shields, clerk.

84 UNITED STATES OF AMERICA, *ss:*

To Charles E. Miller and Daniel G. Rollins, executors, &c., of Chester A. Arthur, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the fourth Monday of October, eighteen hundred and eighty-eight, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein John M. Davies and Robert K. Davies are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated October 1st, 1888.

E. HENRY LACOMBE.

85 [Endorsed:] 2731. U. S. Supreme Court. John M. Davies *et al.*, plaintiffs in error, against Charles E. Miller *et al.*, ex'rs, &c., defendants in error. Citation. Stanley, Clarke & Smith, 120 B'way, N. Y. city, attorneys for plaintiffs in error. Due service of a copy of the within citation is hereby admitted this 1st day of October, 1888. Stephen A. Walker, Sr., attorney for defendants in error. [Stamped:] U. S. circuit court. John A. Shields, clerk. Filed Oct. 1, 1888.

Endorsed on cover: S. New York C. C. U. S. No. 1279. John M. Davies and Robert K. Davies, plaintiffs in error, *vs.* Charles E. Miller and Daniel G. Rollins, executors of Chester A. Arthur, deceased, late collector of the port of New York. Filed October 12, 1888.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

JOHN M. DAVIES AND ROBERT K. Davies, plaintiffs in error,
vs.
CHARLES E. MILLER AND DANIEL G. Rollins, executors of Chester A. Arthur, deceased, late collector of the port of New York. } No. 1279.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

85 [Endorsed:] 2731. U. S. Supreme Court. John M. Davies *et al.*, plaintiffs in error, against Charles E. Miller *et al.*, ex'rs, &c., defendants in error. Citation. Stanley, Clarke & Smith, 120 B'way, N. Y. city, attorneys for plaintiffs in error. Due service of a copy of the within citation is hereby admitted this 1st day of October, 1888. Stephen A. Walker, Sr., attorney for defendants in error. [Stamped:] U. S. circuit court. John A. Shields, clerk. Filed Oct. 1, 1888.

Endorsed on cover: S. New York C. C. U. S. No. 1279. John M. Davies and Robert K. Davies, plaintiffs in error, *vs.* Charles E. Miller and Daniel G. Rollins, executors of Chester A. Arthur, deceased, late collector of the port of New York. Filed October 12, 1888.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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In the Supreme Court of the United States.

OCTOBER TERM, 1888.

JOHN M. DAVIES AND ROBERT K. Davies, plaintiffs in error,
vs.
CHARLES E. MILLER AND DANIEL G. Rollins, executors of Chester A. Arthur, deceased, late collector of the port of New York.
No. 1279.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

And now, November 19, 1888, come the defendants, by the Attorney-General, and move the court to advance the above-stated case for hearing at such early day as may suit the convenience of the court.

The question presented in the record is, Is a protest against a liquidation filed before the ascertainment and

liquidation of the duties, a sufficient compliance with section 2931 of the Revised Statutes?

The reason for this application is that a very large number of cases now pending in the courts of the United States are dependent on, and will be disposed of by, a conclusive determination of the question. In the southern district of New York alone, about one hundred cases, involving the same question, are now on the calendar for trial, as will appear by a copy of a letter from the Secretary of the Treasury herewith submitted.

A. H. GARLAND,
Attorney-General.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., October 31, 1888.

The Honorable
The UNITED STATES ATTORNEY-GENERAL:

SIR—

I have the honor to inform you that I am in receipt of a communication, dated the 25th instant, from the United States Attorney for the Southern District of New York, in which he states that there is a very large number of suits, probably at least one hundred, against Collectors of Customs, on the present trial calendar of the United States Circuit Court for that District, in which protests were served before liquidation, and in which the question is involved as to whether such protests are valid under the provisions of Section 2931 of the Revised Statutes; and requests, inasmuch as such question is now pending before the United States Supreme Court, in the case

of Davies against Miller (N. S., 2731), Supreme Court Calendar number 1279, and as it is very important to the due and orderly disposal of the cases pending in the circuit court that a determination of this question be had in the United States Supreme Court at as early a date as practicable, that a motion be made to have the said case of Davies against Miller (Arthur) advanced for argument so that it can be disposed of at the present term.

If such request meets with your concurrence, I will thank you to move the United States Supreme Court for an advancement of the said suit.

Respectfully Yours,

HUGH S. THOMPSON,
Acting Secretary.